Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1978

No. 78-318

DALLAS POWER & LIGHT COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY,

Petitioners,

v.

CENTRAL POWER & LIGHT COMPANY, PUBLIC SERVICE COMPANY OF OKLAHOMA, SOUTHWESTERN ELECTRIC POWER COMPANY, WEST TEXAS UTILITIES COMPANY, CITY OF ALTUS, OKLAHOMA, CITY OF FREDERICK, OKLAHOMA, CITY OF CORDELL, OKLAHOMA, CITY OF MANNFORD, OKLAHOMA, VERDIGREE VALLEY ELECTRIC COOPERATIVE, INC., INDIAN ELECTRIC COOPERATIVE, INC., MUNICIPAL ELECTRIC SYSTEMS OF OKLAHOMA, ARKANSAS ELECTRIC COOPERATIVE CORPORATION, FEDERAL ENERGY REGULATORY COMMISSION, HOUSTON LIGHTING & POWER COMPANY, CITY OF SAN ANTONIO, LOWER COLORADO RIVER AUTHORITY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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---

The Petitioners, Dallas Power & Light Company (DP&L) Texas Electric Service Company (TESCO), and Texas Power & Light Company (TP&L), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 10, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 575 F. 2d 937 (D.C. C.A. 1978) and is attached hereto as Appendix A. The unreported order of the Court of Appeals, denying a timely Petition for Rehearing and Alternatively Suggestion for Rehearing En Banc, is attached as Appendix B. The unreported decision of the Federal Power Commission (now the Federal Energy Regulatory Commission) (Commission), issued July 21, 1976, in Federal Power Commission Docket No. E-9558, is attached as Appendix C, and the Commission's unreported order denying a rehearing, issued September 17, 1976, is attached as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 10, 1978. A timely petition for a rehearing *en banc* was denied on May 26, 1978. The jurisdiction of the Court of Appeals was invoked pursuant to § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). This petition, seeking a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia, was timely filed within 90 days of May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

QUESTION PRESENTED

The sole question presented for review is whether the Federal Power Act (Act) delegates to the Commission any power to exercise jurisdiction over electric utility companies which, at the time of the Commission's decision and at all subsequent times, neither own nor operate any facilities outside a single state and which neither, directly nor indirectly, transmit nor sell, at wholesale or retail, any electric energy in interstate commerce.

STATUTORY PROVISIONS INVOLVED

Sections 201 and 202 of the Federal Power Act, 16 U.S.C. § 824 and § 824a, are set forth as Appendix E.

STATEMENT OF THE FACTS

All facts relevant to a resolution of the jurisdictional status of DP&L, TESCO and TP&L under the Act are admitted by all parties and were not in dispute at the Court of Appeals.

DP&L, TESCO and TP&L are electric utility companies engaged in the generation, transmission, distribution and sale of electric energy solely in the State of Texas. Texas Utilities Company owns 99.6% of the common stock of DP&L and all the common stock of TESCO and TP&L. DP&L serves the City of Dallas and three adjoining incorporated communities within Dallas County. TESCO serves customers in 47 counties in north-central and west Texas, including the cities of Fort Worth, Wichita Falls and 71 other incorporated municipalities. TP&L serves customers in 51 counties in north-central and east Texas, including 259 incorporated municipalities. DP&L, TESCO and TP&L are referred to collectively as the TU Companies.

The TU Companies neither own nor operate facilities located outside the State of Texas which are used in the generation, transmission, distribution or sale of electric power. Moreover, the TU Companies have historically arranged the operation of their electrical systems to confine their operations solely to the State of Texas.[1]

[1] During World War II and the Korean Conflict, the TU Companies were interconnected to interstate systems under exemptions from the Act. On a limited number of other occasions during the existence of an electrical emergency, the TU Companies have provided emergency interconnected service to other systems operating in interstate commerce. On each such occasion, an exemption from jurisdiction under the Act has been obtained.

Houston Lighting & Power Company (HL&P) is an electric utility company engaged in the generation, transmission, distribution and sale of electric energy in the Texas Gulf Coast Region, including the cities of Houston, Galveston, and 151 other cities, villages and communities.

Central Power & Light (CP&L), Public Service Company of Oklahoma (PSO), Southwestern Electric Power Company (SWEPCO) and West Texas Utilities Companies (WTU) are wholly owned subsidiary corporations of Central and South West Corporation (CSW), and each is an electric utility company engaged in the generation, transmission, distribution and sale of electric energy. CP&L serves customers in 44 communities in southern Texas, including the city of Corpus Christi. WTU serves customers in 50 counties in central and west Texas, including the city of Abilene. All of the facilities of CP&L and WTU are located solely within the State of Texas. PSO serves customers in eastern and southwestern Oklahoma, including the city of Tulsa. SWEPCO serves customers in northwestern Louisiana, northeastern Texas and northwestern Arkansas, including the city of Shreveport, Louisiana.

The TU Companies, HL&P, CP&L and WTU are each an electric utility within the meaning of the Texas Public Utility Regulatory Act (Tex. Ver. Code Ann. Art 1446c) and as such are subject to the jurisdiction of the Texas Public Utility Commission.

Electric utility companies frequently interconnect with neighboring electric utility systems to prevent the unexpected interruption of electric service to their customers as a result of lost generation or transmission due to natural calamities, equipment failures or other causes. Interconnections among electric utilities in Texas have developed into a compact electrical network consisting of electric systems with generation capacity exceeding 30,000 megawatts. This interconnected group of electric utilities is known as the Electric Reliability Council of Texas (ERCOT), one of nine regional electric system coordinating councils located throughout the United States designed to promote coordinated and long-range planning among such utilities. ERCOT consists of the TU Companies, HL&P, CP&L, WTU, the Lower Colorado River Authority, the electric utility system owned by the city of Austin, the City Public Service Board of San Antonio, which operates the electric utility system owned by the city of San Antonio, and various other municipally-owned electric systems and cooperatives located throughout the state of Texas.

Prior to May 4, 1976, the electric systems in ERCOT and all systems interconnecting any ERCOT system, operated solely within the state of Texas[2].

On May 4, 1976, at approximately 5:30 a.m., WTU unilaterally and without prior notice to anyone, wired around an electrical switch at the Vernon, Texas, substation which thus permitted electric energy to flow from Texas into

[2] While WTU did not own any facilities located outside the State of Texas, it did maintain interconnections with PSO at the Texas-Oklahoma border. To avoid interstate operation, WTU historically operated as two separate systems — an interstate system and a Texas intrastate system. The interstate system includes a portion of its service area adjacent to the State of Oklahoma and lying along the Texas-Oklahoma boundary from north of Shamrock to east of Vernon, Texas. WTU's interstate facilities were so structured as to permit it to operate in synchronism with either its Texas intrastate system or with PSO but never in synchronism with both its Texas intrastate system and interstate system simultaneously. A contract covering the interconnections between TESCO and WTU, entered into in 1938, requires both parties to notify the other prior to the commencement of interstate operations in order to permit the other party to disconnect, a right clearly provided in the contract, in order to limit its operations to the State of Texas, free of the Commission's jurisdiction.

Oklahoma, and simultaneously disconnected PSO's facilities, thereby preventing electricity generated in Oklahoma to flow into Texas. Thereafter, WTU's previously intrastate facilities began serving three small communities in Oklahoma theretofore served by PSO. This action of WTU was, without dispute, a clear violation of the WTU-TESCO agreement. See note 2.

Until 3:43 p.m. on May 4, 1976, the TU Companies and HL&P remained interconnected with WTU and with the other member systems of ERCOT.

By 3:43 p.m. on May 4, 1976, all interconnections, directly or indirectly, of the TU Companies with WTU and CP&L were separated so that the TU Companies thereafter operated electrically isolated from all systems operating either directly or indirectly in interstate commerce or subject to the jurisdiction of the Commission. These facts are undisputed.

Since 3:43 p.m. on May 4, 1976, the TU Companies have not owned or operated any facilities used in the transmission, sale, receipt or delivery of electric energy in interstate commerce, have not transmitted or sold, at wholesale or retail, electric energy outside the state of Texas, and have not been interconnected, directly or indirectly, with the facilities of any other system used for the transmission or sale of electric energy in interstate commerce which could subject the TU Companies to the jurisdiction of the Commission.[3]

[3] On May 2, 1977, the Texas Public Utility Commission, after a full hearing on the merits, ordered all electric systems to return to the historical intrastate mode of operation which existed prior to May 4, 1976. Since May 4, 1977, that mode of operation has been restored and all interconnection between the ERCOT systems remain in place. The Amended Final Order of the Texas Public Utility Commission dated July 11, 1977, is attached as Appendix F.

On May 4, 1976, at approximately 9:30 a.m., the CSW subsidiaries filed a petition with the Commission seeking, among other things, an order declaring the TU Companies and HL&P jurisdictional by virtue of the surreptitious actions taken by WTU four hours earlier.

Based upon the undisputed facts, the Commission found, on July 21, 1976, that it had no power over the TU Companies or HL&P, since at the time of its decision, no factual predicates for the exercise of jurisdiction existed. In so holding, the Commission expressly adopted the conclusions of its General Counsel, whose memorandum was attached to the Commission's decision.

The General Counsel's memorandum sets forth his conclusion quite succinctly:

> My conclusions are fourfold:
>
> Prior to May 4, 1976, the aforementioned four systems were operating in electrical isolation from any electric system which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they were not susceptible to classification as 'public utilities';
>
> During May 4, 1976, from 5:30 a.m. to 3:43 p.m., the aforementioned four systems operated in parallel — or electrical synchronizism [SIC] — with other electric utilities which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they were susceptible to review by the Commission as to their 'public utility' status;
>
> *Subsequent to May 4, 3:43 p.m., the aforementioned four systems [the TU Companies and HL&P] have been operating in electrical isolation from any electric system which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they are not susceptible to classification as 'public utilities';* and,

> During the 10-hour period of synchronous electrical operation on May 4, the facilities and operations of the aforementioned systems were, for all practical purposes, those for the transmission of electric energy in intrastate commerce, . . . and such systems fall within the commission's rule of determining 'public utility' status based upon the overall characteristics of the electric system's operations, notwithstanding some interstate transmission of electric energy. [Emphasis added.]

The Court of Appeals found the basis for the Commission's decision confusing:

> . . . the general counsel's memorandum indicates that the HL&P and TU companies were, at all times, outside the Commission's jurisdiction as a matter of law, i.e., the exercise of jurisdiction was not a matter for the Commission's discretion. But the authorities cited by the general counsel are cases which involved or discussed the Commission's discretion to decline jurisdiction over a firm even though it might have been a public utility within the meaning of the Federal Power Act. 575 F. 2d at 939.

Thus, the court, without deciding the scope of the Commission's jurisdiction, remanded for clarification of its reasoning the order of the Commission, even though the court expressly acknowledged that "a reading of the Commission's decision does not establish that it was purporting to exercise discretion." 575 F. 2d at 939.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred as a matter of law in not deciding the question of jurisdiction on the merits. The remand for clarification of the Commission's reasoning flies squarely in the face of a clear statutory demarcation of jurisdiction beyond which the Commission was prohibited to act. The

remand also contradicts this Court's decision in *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1943). Finally, the action of the Court of Appeals raises an issue of critical importance not only with respect to the scope of the Commission's jurisdiction over electrical utilities operating solely in intrastate commerce but also in the delicate balance of federal regulation and complementary state regulation. Consequently, the Court of Appeals' action so far departs from the accepted and usual course of judicial proceedings as to necessitate intervention by this Court with the issuance of a writ of certiorari.

I. The Court of Appeals erred as a matter of law in refusing to resolve the scope of the Commission's jurisdiction.

The threshold issue before the Commission and the Court of Appeals and the sole issue before this Court is the proper scope of the Commission's jurisdiction. All relevant facts necessary to a resolution of this issue are undisputed and admitted.

As this Court has said, the scope of an administrative agency's jurisdiction is to be finally determined by the courts and not by the agency. *See, e.g., Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946); *J. B. Montgomery, Inc. v. United States*, 206 F. Supp. 455, 458 (D. Colo. 1962), *aff'd.*, 376 U.S. 389 (1964); *Martin v. Federal Security Agency*, 73 F. Supp. 482, 489 (W. D. Pa. 1947), *aff'd.*, 174 F. 2d 364 (3 C.A. 1949).

The appellate court is charged with the duty and responsibility to decide jurisdiction and cannot relegate that judicial function to the agency. See *Stark v. Wickard*, 321 U.S. 288, 309-10 (1943).

This Court requires appellate courts to "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). Moreover, in *Alabama Power Co. v. FPC*, 511 F. 2d 383 (D.C.C.A. 1974), the Court of Appeals for the District of Columbia Circuit itself said: "We do not review agency action in order to perfect the administrative process to the nth degree. A court should uphold an agency even when its findings lack ideal clarity, if 'the agency's path may reasonably be discerned.' " *Id.* at 392. See *Kurzon v. United States Postal Service*, 539 F. 2d 788 (1 C.A. 1976).

Moreover, the Court of Appeals' search for ideal clarity in this case resulted not only in an unnecessary remand but also in a court confused by its own misapprehension of both the law and the facts. The Court of Appeals read the General Counsel's memorandum as indicating "that the HL&P and TU Companies were, *at all times*, outside the Commission's jurisdiction as a matter of law. 575 F. 2d at 939. (Emphasis added.) The General Counsel's memorandum, however, in unmistakable language, concluded that the TU Companies were "susceptible to review" by the Commission as "public utilities" within the meaning of the Act only during the ten-hour period on May 4, 1976. Thus, the Commission possessed discretion to exercise jurisdiction over the TU Companies only so long as the TU Companies remained interconnected with WTU after WTU began service to the small communities in Oklahoma. When those connections were opened, all power of the Commission to assert jurisdiction ceased.

Moreover, the Court correctly concluded that the decision by the Commission holding that the TU Companies were not jurisdictional did not purport to reflect that the Commission, in so holding, was exercising its discretion. The Court observed that: "It is hornbook law that the court must appraise agency action not on grounds advanced by counsel but on those identified by the agency as reasons for its actions." 575 F. 2d at 938. Nevertheless, the Court became confused because of the oral and written arguments to it by FERC counsel "that the decision not to assert jurisdiction was a proper exercise of agency discretion." 574 F. 2d at 938.

This kind of logical inconsistency by the Court in the face of its demand for perfect clarity of reasoning on the part of the agency is entirely inexplicable. Thus, the remand for clarification of reasoning by the Court might result in a lengthy and totally unnecessary inquiry by the Commission into issues wholly irrelevant to a determination of the Commission's jurisdiction.[4]

The failure of the Court of Appeals to reach the merits of the simple jurisdictional issue raised in this case illustrates that Court's inclination for judicial nitpicking which this Court recently criticized in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 98 S. Ct. 1197 (1978).

The basic issue is stark and simple: May the Commission, as a matter of law, assert jurisdiction over an electric utility where it has no interstate facilities and no interstate transmissions of electric power, simply because at one time, for ten hours and without its knowledge, it may be found to have engaged, indirectly through its interconnections with another, in the interstate transmission of electricity? If it may not, it is an exercise in futility to require the Commission to review the circumstances that would lead it to assert or refuse to assert jurisdiction, since it had no such options.

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[4] A summary of related proceedings is as Appendix G.

Moreover, an explication by the Commission of its rationale in language of "ideal clarity" will not lift from the Court of Appeals and ultimately from this Court the burden of resolving the proper scope of the Commission's jurisdiction. Consequently, the remand serves no logical or legal purpose and merely postpones for a later day the final resolution of an important issue of the scope of federal administrative power over the delivery of electric energy, a matter declared by Congress to be affected with a public interest (Section 201(a) of the Act, 16 U.S.C. § 824(a)) and a matter of intense national concern. This Court should not countenance the refusal of the Court of Appeals to decide the scope of jurisdiction in this case.

II. The remand by the Court of Appeals flies squarely in the face of clear statutory language and intent.

In enacting the Federal Power Act, Congress drew a bright line of demarcation separating matters over which the Commission has jurisdiction and matters over which the Commission possesses no power to act. Congress thereby struck a delicate balance between matters of essentially national concern and matters falling within the scope of local regulation. It is axiomatic that the Commission's jurisdiction is coextensive with the Act; if jurisdiction exists at all, it must flow from the Act. Clearly the Commission has no power, mandatory or discretionary, over matters outside the scope of persons and subject matters delineated in the Act.

A plain reading of the Act is dispositive of the jurisdictional issue in this case. Had the Court of Appeals analyzed the Act, it would have concluded, just as the Commission concluded, that the Commission possessed no power to assert jurisdiction over the TU companies or HL&P as a matter of law.

Section 201(b) of the Act defines the scope of matters covered and the scope of the Commission's power over such matters:

> (b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. 16 U.S.C. § 824(b).

Section 201(c) of the Act defines energy transmitted in interstate commerce as

> electric energy . . . transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. 16 U.S.C. § 824(c).

Section 202(b) of the Act defines the power of the Commission to order interconnections among jurisdictional utilities:

> (b) Whenever the Commission, . . . finds such action necessary or appropriate in the public interest it may by order direct a *public utility* (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange

energy with such persons. (Emphasis added.) 16 U.S.C. § 824a (b).

Consequently, the plain meaning and language of the Act results in the conclusion that the Commission has jurisdiction over a utility only so long as the utility is a "public utility" within the meaning of the Act, that no utility is a "public utility" unless it "owns or operates facilities subject to the jurisdiction of the Commission," and that the Commission's jurisdiction extends only to facilities used "for the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce."

III. The remand by the Court of Appeals contradicts this Court's decision in *Connecticut Light & Power Company v. FPC.*

This Court has long recognized that the test of jurisdiction must be measured from facts which exist at the time the agency asserts jurisdiction. In *Connecticut Light & Power Company v. FPC*, 324 U.S. 515 (1945) this Court stated:

> Of those facilities which the Commission held subjected the Company to the Power Act at the time it became effective the Company has since divested itself of all but one, *and on that one the Commission rests its present jurisdiction to control petitioner's accounting. Id.* at 519 . . . The order must stand or fall on whether the company owned facilities that *were used* [at the time the Commission found it possessed jurisdiction] *in transmission of interstate power* and which were not facilities in local distribution. *Id.* at 531. (Emphasis added.)

In the present case, the undisputed evidence clearly established that at all times after 3:43 p.m., May 4, 1976, the TU Companies have operated electrically isolated from all systems susceptible to the jurisdiction of the Commission under the Federal Power Act.

Moreover, both this Court and the Commission have specifically recognized the right of utilities susceptible to the Commission's jurisdiction to withdraw therefrom and the right of otherwise non-jurisdictional utilities to so structure their affairs as to remain not susceptible to the Commission's jurisdiction. In *Connecticut*, this Court observed:

> Two days before [the Federal Power Act's] effective date and frankly for the purpose of avoiding federal regulation the Company rearranged its operations with intent to cut every connection and discontinue every facility whose continued operation would render it subject to the Federal Power Commission's control. *The Commission conceded in its opinion and the Government admits here the Company's right to do so.* 324 U.S. at 518-19. (Emphasis added.)

On remand of *Connecticut* by this Court, the Commission repeated the principle that an electric utility had the right to avoid jurisdiction:

> The circumstances of this case illustrate strikingly the manner in which a company, by a series of calculated actions may, step by step, remove itself from the jurisdiction of this Commission. . . . *The Company is now about to remove any remaining shadow of doubt as to its status by cutting its last remaining connection with out-of-state power at its Bristol substation. It will then become wholly intrastate, subject only to jurisdiction of the Connecticut Commission. In so doing the company is clearly within its legal rights. Connecticut Light & Power Company*, 6 F.P.C. 104, 110 (1947). (Emphasis added.)

What Connecticut did by selling the only facility by which it was jurisdictional, the TU Companies did by 3:43 p.m., May 4, 1976, by opening all its interconnections with WTU

and others engage, directly or indirectly, in the sale, transmission, receipt or delivery of electric energy in interstate commerce, thereby electrically confining their operations solely to Texas.

Finally, even under the "electromagnetic" test of jurisdiction announced by this Court in *FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972), no jurisdiction exists in this case since no electricity generated in the TU Companies' systems could flow in interstate commerce without the interconnections closed which were opened by TESCO at 3:43 p.m. on May 4, 1976.

CONCLUSION

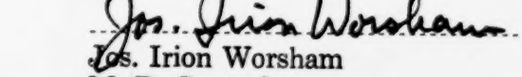
The Court of Appeals committed error in three ways. First, it refused to address the merits of the scope of the Commission's jurisdiction. Second, had it analyzed Sections 201 and 202 of the Federal Power Act, it would have concluded that the Commission had no discretion to exercise since as a matter of law under the undisputed facts the Commission possessed no jurisdiction over the TU Companies. Third, the Court misread both the decision of the Commission and the Federal Power Act and refused to apply this Court's decision in *Connecticut Light & Power Company v. FPC.*

Therefore, unless this Court grants the writ hereby sought, the limits of federal regulatory authority over electric utilities will be brought into question, the scope of complementary state regulation will be cast in doubt and the clear line of demarcation between federal and state authority of the electric utility industry will be made fuzzy. Further, the failure of this Court to correct the clear error of the Court of Appeals may result in the useless proliferation of an

already complex maze of related litigation and will result in the unnecessary postponement of the final resolution of an important issue of critical national concern and importance. Neither the Congress in enacting the Federal Power Act nor this Court in deciding *Connecticut Light & Power Company v. FPC, supra.*, intended such a result. Moreover, neither the electric utility industry nor the public can tolerate such consequences.

For all these reasons, Dallas Power & Light Company, Texas Electric Service Company and Texas Power & Light Company pray that this Court grant this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, that this Court reverse the decision of that Court of Appeals and that this Court direct the Court of Appeals to sustain the Commission's determination that it is without jurisdiction over the TU Companies as a matter of law.

Respectfully submitted,



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ATTORNEYS FOR
DALLAS POWER & LIGHT COMPANY
TEXAS ELECTRIC SERVICE COMPANY AND
TEXAS POWER & LIGHT COMPANY

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1995

CENTRAL POWER & LIGHT COMPANY,
PUBLIC SERVICE COMPANY OF OKLAHOMA,
SOUTHWESTERN ELECTRIC POWER COMPANY, and
WEST TEXAS UTILITIES COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ARKANSAS ELECTRIC COOPERATIVE CORP.
HOUSTON LIGHTING & POWER COMPANY,
CITY OF SAN ANTONIO,
LOWER COLORADO RIVER AUTHORITY,
DALLAS POWER & LIGHT COMPANY, et al.,
Intervenors,

No. 76-2012

CITY OF ALTUS, FREDERICK, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

DALLAS POWER & LIGHT COMPANY,
HOUSTON LIGHTING & POWER COMPANY,
LOWER COLORADO RIVER AUTHORITY,
Intervenors.

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Argued February 27, 1978

Decided April 10, 1978

Richard D. Cudahy with whom *Robert H. Loeffler* was on the brief, for petitioners in No. 76-1995. Also *Richard D. Ferguson* and *Paul T. Ruxin* entered appearances for petitioners in No. 76-1995.

Charles F. Wheatley, Jr. and *Robert A. O'Neil* were on the brief, for petitioners in No. 76-2012.

McNeill Watkins, II, for respondent. *Drexel D. Journey*, General Counsel. *Robert W. Perdue*, Deputy General Counsel, *Allan Abbot Tuttle*, Solicitor and *Allan M. Garten*, Attorney, Federal Energy Regulatory Commission were on the brief, for respondent.

Gordon Gooch with whom *Bruce Kiely* and *Steven Huncicker* [sic] were on the brief, for intervenor, Houston Lighting and Power Company in Nos. 76-1995 and 76-2012. Argued on behalf of all intervenors.

Lawrence S. Smith was on the brief for intervenor, Lower Colorado River Authority in Nos. 76-1995 and 76-2012.

Jon C. Wood was on the brief, for intervenor, The City of San Antonio, Texas in No. 76-1995.

Also *Harry A. Poth, Jr.*, *Richard M. Merriman*, and *Peyton G. Bowman, III* entered appearances for intervenor, Dallas Power and Light Company in No. 76-1995 and 76-2012.

Also *Robert Weinberg* entered an appearance for intervenor, Arkansas Electric Cooperative Corp. in No. 76-1995.

Before: McGOWAN, LEVENTHAL and ROBB, *Circuit Judges*.

Opinion Per Curiam.

PER CURIAM: This case involves a challenge to a ruling by the Federal Power Commission (now the Federal Energy Regulatory Commission (FERC)) that it could not compel interconnection among the West Texas Utilities Company (WTU), the Houston Lighting & Power Company (HL&P), and the Texas Utilities Company (TU) under § 202(b), (c) of the Federal Power Act, 16 U.S.C. § 824a(b), (c) (1976), because it did not have jurisdiction over the latter two companies. All three utilities were members of a Texas intrastate power pool (ERCOT).

There is confusion as to the basis of the FERC's action. The Commission's brief argues that the decision was grounded in material part on the fact that HL&P's and TU's nexus with interstate transmission was the product of a breach of contract: a ten hour period on May 4, 1976, during which WTU transmitted power to an affiliated company in Oklahoma without the knowledge of HL&P and TU and in express violation of a contract between WTU and the Texas Electric Utility Company [sic], a subsidiary of TU. Thus the FERC argues that the decision not to assert jurisdiction was a proper exercise of agency discretion.

One difficulty with this contention is the failure to confront questions as to the legality of the contract. Petitioners' central position is that the agreement among the Texas utilities not to transmit interstate was part of a group boycott in violation of the antitrust laws. While the FERC does not have authority to adjudicate antitrust actions, antitrust

considerations are relevant when it exercises its discretion subject to a public interest mandate. *Gulf States Utilities Company v. FPC*, 411 U.S. 747 (1973), and cases cited therein. There is no evidence in the record that the FERC considered petitioners' antitrust contentions.

Another problem is whether the breach of contract was actually material to the Commission's conclusion. The Commission's order simply states that it adopts the general counsel's conclusion that HL&P and the TU companies are not "public utilities" within the meaning of § 201(e) of the Federal Power Act, 16 U.S.C. § 824(e) (1976). Appendix at 117. Section 201(e) simply defines "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter." There is no mention of the contract in the general counsel's memorandum. *Id.* at 122-24. It is hornbook law that the court must appraise agency action not on grounds advanced by counsel but on those identified by the agency as reasons for its actions. *SEC v. Chenery Corporation*, 318 U.S. 80, 92-94 (1943).

There is further confusion concerning the basis of the Commission's ruling: the general counsel's memorandum indicates that the HL&P and TU companies were, at all times, outside the Commission's jurisdiction as a matter of law, *i.e.*, the exercise of jurisdiction was not a matter for the Commission's discretion. But the authorities cited by the general counsel are cases which involved or discussed the Commission's discretion to decline jurisdiction over a firm even though it might have been a public utility within the meaning of the Federal Power Act. *Connecticut Light & Power Company v. FPC*, 324 U.S. 515, 536 (1945); Letter of the FPC to Home Light and Power Company, dated May 28, 1965 (Appendix at 127).

In argument to this court in support of the Commission's ruling, FERC counsel contends that what the general counsel intended to indicate in his memorandum was that an exercise of jurisdiction was within the Commission's discretion. He further argues that although the general counsel could not exercise that discretion for the agency, he could make a recommendation, and that that in fact is all he did in this case. Again, a reading of the Commission's decision does not establish that it was purporting to exercise discretion. Furthermore, discretion can be exercised only in light of all the relevant factors. Totally absent from the general counsel's memorandum and the Commission's opinion is any reference to antitrust considerations or any other component of a public interest determination. As the Supreme Court observed in *Gulf States Utilities*, "where the Commission summarily disposes of proffered objections, or where it exercises its discretion . . . without considering . . . anticompetitive consequences, 'the reviewing court must closely scrutinize its action in light of the . . . statutory obligations to protect the public interest and to enforce the antitrust laws.'" 411 U.S. at 763 (quoting *Denver & R.G.W.R. Co. v. United States*, 387 U.S. 485, 498 (1967)).

Our judicial function embraces ruling on what we fairly discern as the basis of the Commission's action, but it does not include speculating on the Commission's intentions. *Id.* at 764. We do not say the result reached by the Commission is contrary to law. What we do say is that the FERC has not complied with its obligation to articulate its reasoning. We therefore remand for clarification of that reasoning. In the event exercise of discretion is involved, as was put to us in support of this order, it must be accompanied by some indication in the record that all relevant factors were taken into account.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977
No. 76-1995

CENTRAL POWER AND LIGHT COMPANY,
PUBLIC SERVICE COMPANY OF OKLAHOMA,
SOUTHWESTERN ELECTRIC POWER COMPANY, and
WEST TEXAS UTILITIES COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ARKANSAS ELECTRIC COOPERATIVE CORP., et al.,
Intervenors.

and consolidated case No. 76-2012

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by intervenors Dallas Power and Light Company, et al, and of the memorandum filed by intervenor Houston Lighting and Power Company in support of the petition for rehearing and/or suggestion for rehearing *en banc*, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that intervenors' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court:

George A. Fisher
Clerk

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Central Power & Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and West Texas Utilities Company } Docket No. E-9558

ORDER REJECTING IN PART AND ACCEPTING IN PART APPLICATION FOR ACTION PURSUANT TO SECTION 202

(Issued July 21, 1976)

On May 4, 1976, Central Power & Light Company (CP&L), Public Service Company of Oklahoma (PSO), Southwestern Electric Power Company (SWEPCO), and West Texas Utilities Company (WTU), (Applicants) filed a petition and application with this Commission stated to be pursuant to Sections 202(a) and 202(b) of the Federal Power Act. On May 5, 1976, the Lower Colorado River Authority, (LCRA), a political subdivision of the State of Texas, requested an order of the Commission requiring Applicants to remain connected with Houston Power and Light (HP&L) [sic] Texas Electric Service Company (TESCO), Dallas Power and Light (DP&L) and Texas Power and Light Company (TP&L). On May 13, 1976, Applicants filed a motion application to

> ". . . require the emergency reconnection of electric facilities described below, pursuant to Section 202(c) of the Federal Power Act."

Applicants state that on May 4, 1976 as a result of a determination that a portion of PSO's load at Davidson, Frederick and Tipton, Oklahoma could be served more economically from the southern part of WTU's system by a 69 kv line from WTU's Vernon Substation, WTU began transmitting and selling electricity for resale to PSO. As a result, Applicants state,

> "the interconnections between the electrical facilities of PSO and WTU resulted in the transmission of electric energy at wholesale in interstate commerce by all the members of ERCOT and SWPP. Because HL&P, DP&L, TESCO and TP&L each own and operate facilities for such transmission and sale of electric energy, and because none is otherwise exempt from the jurisdiction of the Federal Power Commission, each, like the Applicants, is a public utility within the meaning of the Federal Power Act." (See page 4 of Petition and Application).

Based upon such facts as alleged by the Applicants, and citing Section 202(a) of the Federal Power Act, Applicants have requested that the Federal Power Commission:

(1) Conduct such investigations and issue such orders as are necessary and proper under Section 202(a) of the Federal Power Act, to promote and encourage continued and expanded interconnection of facilities for the generation, transmission and sale of energy between members of SWPP and ERCOT;

(2) Issue such orders under Section 202(b) of the Federal Power Act, as may be necessary to continue and maintain the existing interconnections between Petitioners and members of ERCOT; and

(3) Conduct such investigations and issue such orders under Section 202(b) of the Federal Power Act, as are necessary to establish additional interconnections between members of ERCOT and members of SWPP.

After transmission of electric energy in interstate commerce by TWU on May 4, 1976, this Commission was notified by HL&P and TESCO that they had severed all previous interconnections with WTU and CP&L in order that they retain within Texas the physical operation of transmitting and selling electric energy generated within the State of Texas.

On May 5, 1976, the General Manager of LCRA, filed a protest with the Federal Power Commission stating that LCRA was interconnected with WTU and CP&L, and that the severing of interconnections by TESCO, DP&L, TP&L, and HL&P "* * * may well jeopardize the reliability of service of the Lower Colorado Power Authority [sic] * * *".

On May 13, 1976, CP&L, and WTU filed "Motion for Emergency Interconnection Pursuant to Section 202(c) of the Federal Power Act". WTU and CP&L agree in their Motion that HL&P has opened its long standing interconnections with CP&L and also its interconnections with LCRA and TP&L. On or about May 4-5, 1976, TESCO, DP&L and TP&L opened all of their interconnections except those existing among themseves. In addition, TESCO has opened its long standing interconnections with WTU. Applicants further state, in their May 13, 1976 Motion that the interconnections opened by HL&P, TESCO and TP&L have been in operation for many years and are a factor in the amount of capacity installed in Texas to meet the loads imposed on all parties described in the Motion. According to that Motion these interconnections were designed to provide a sufficient reserve margin of electric generation capacity to ensure the reliable flow of electric energy to the customers of all the parties; the systems of the various parties, were alleged to have been, designed and operated to rely on the continued inter-

connections among them all; and to the extent such interconnections are interrupted, reliability is allegedly impaired and the public interest not be served by the unilateral realignment imposed by HL&P and TESCO on May 4, 1976, or any other realignment which excludes WTU and CP&L. For these reasons the Applicants request that the Commission enter an order under Section 202(c) of the Federal Power Act, to require immediate resumption and continuation of all the interconnected service among all of the parties as it was on May 3, 1976. In addition, Applicants propose that the compensation among the systems for the services thereby provided would be at the rates and charges in effect prior to May 4, 1976.

On May 14, 1976 HP&L filed, "Response of Houston Lighting and Power Company to Motion of Central Power and Light Company and West Texas Utilities Company for Emergency Interconnection Pursuant to Section 202(c) of the Federal Power Act." The Response states in part (p. 1):

> HL&P hereby objects to this motion and submits that the Commission should not order the actions requested therein without first convening a hearing in order to determine whether an emergency exists within the meaning of the Act and the Commission's regulations thereunder. Furthermore, regardless of what action may be taken by the Commission, it should deny the claim made by Movants that HL&P and the other named TIS member companies be denied their statutory right to proceed under Section 202(d) should the Commission determine that an emergency exists.

In addition, on May 17, 1976 the "Reply of Dallas Power and Light Company to Motion of Central Power and Light Company and West Utilities Company [sic] for Emer-

gency Interconection Pursuant to Section 202(c) of the Federal Power Act," was filed. That Reply states in part (pp. 2, 6):

> The simple facts are, however, that the emergency, if any, which is now claimed by CP&L and WTU is of their own creation and is based on wholly ulterior motives. By now this Commission is fully aware of the pre-dawn escapade of WTU on Tuesday, May 4, 1976, when it voluntarily commenced electric service to three small communities in Oklahoma from its previously Texas intrastate generating facilities in violation of its contract with Texas Electric Service Company (TESCO), fully cognizant that such action would provoke a disconnection by TESCO of its several ties with WTU and of the several ties with certain other members of the Texas Interconnection System. (pg. 2).
>
> No attempt, however, has been made to establish the existence of any of the basic criteria prerequisite to the invocation of emergency action under Section 202(c) of the Act and Section 32.61(e) of the Regulations. There is no showing:
>
> (a) Of the problem situation;
>
> (b) Of the resource limitations which require electric power and/or emergency transfers;
>
> (c) That without additional power and energy transfers the applicants will be unable to maintain electric utility service required in public interest;
>
> (d) Of the firm amounts of electric power and energy received from and delivered to other systems;
>
> (e) That despite "*diligent best efforts*" additional power and energy cannot be purchased; or
>
> (f) Of what steps have been taken to secure voluntary interconnections and emergency transfers.

On May 18, 1976, DP&L, TESCO, and TP&L filed a petition to intervene. On May 19, 1976, LCRA also filed a petition to intervene. And on May 25, 1976, the City of San Antonio through its City Public Service Board (CPSB); and the Cities of Altus, Frederick, Cordell, Mannford; Verdigree Valley Electric Coop, Inc.; Indian Electric Coop, Inc., the Municipal Electric System of Oklahoma (Cities) petitioned to intervene on June 25, 1976, Arkansas Electric Cooperative Corporation petitioned to intervene.

On May 19, 1976, LCRA filed "Response of Lower Colorado River Authority To Motion Of Central Power and Light Company and Texas Utilities Company For Emergency Interconnection". LCRA's filing states in part:

> Since May 4, 1976, the major electric generating utilities in Texas have been operating in two separate groups. Houston Lighting and Power Company, the operating subsidiaries of Texas Utilities and the Texas Municipal Power Pool, with an aggregate of approximately 75% of the generating capacity in the state, are interconnected among themselves, and West Texas Utilities, Central Power and Light Company, the City of Austin, City Public Service Board of San Antonio, and LCRA are interconnected.
>
> Since the date the Texas Interconnected System became bifurcated the group of which LCRA is a part has already experienced an episode of severely fluctuating frequency caused by the sudden loss of a moderate amount of generating capacity. As the heat of the summer and its attendant peak load conditions approach, such disturbances can only be exacerbated to the point, in LCRA's judgment, of forced load shedding on the part of one or more of the utilities with which it is interconnected. Under the circumstances, the present situation constitutes an emergency within the meaning of the Federal Power Act. [Section 202(d)]. An order of the Federal Power Commission to allow the systems

> previously members of TIS to restore temporarily the connections which were disconnected on May 4, 1976, is necessary and appropriate to meet this emergency.

On May 21, 1976, *CP&L* and *WTU* filed a Response to the **Replys [sic] of DP&L, *et al.*,** HP&L [sic] and LCRA. The Response reasserts the previously stated position of CP&L and WTU.

On June 21, 1976, CP&L, WTU *et al.* filed a Motion with the Commission requesting an order initiating and scheduling hearings on their previously filed application of May 4, 1976 and their Motion of May 13, 1976. On June 30, 1976 DP&L, TESCO and TP&L responded requesting denial of the Motion and on July 6, 1976 HP&L responded also requesting denial of the Motion.

CP&L, WTU *et al.*, on July 6, 1976 filed an additional motion asserting in part:

> Currently there are substantial controversies both of fact and of law as to whether an emergency affecting the electric utilities in Texas in fact exists. If such an emergency may be said to exist, there is significant disagreement as to its nature and expected duration. Hence it is crucial to the public interest that any order entered by the Commission and responsive to an emergency, however defined, be based upon an adequate record.

In addition the Motion of June 6, 1976 states:

> Applicants contend that, by reason of the legal responsibilities of Texas Electric Service Company and Houston Lighting and Power Company to interconnect with West Texas Utilities Company and Central Power and Light Company and the fact that Central Power and Light Company and West Texas Utilities Company are engaged in the transmission of electric energy in interstate commerce, and otherwise, Texas Electric Service Company and Houston Lighting and Power Company are subject to the jurisdiction of the Commission.

Based on the above allegations the motion of CP&L, WTU, *et al.*, requests:

> . . . that the Commission conduct hearings prior to issuing any order under Section 202(c) or 202(d) or to issuing any order purporting to decide the question of the jurisdiction of the Commission over the Texas Utilities subsidiaries or Houston Lighting and Power Company.

We find that based upon the pleadings filed by all of the parties to this proceeding, the facts surrounding the events of May 4, 1976, are uncontested. Therefore, pursuant to Section 201 of the Federal Power Act, 16 USC 824, the Commission finds Central Power & Light Company and West Texas Utilities Company to be "public utilities" within the meaning of the Act and, therefore subject to the jurisdiction of this Commission. The Commission on June 30, 1976 requested its General Counsel to address the "public utility" jurisdictional status as it relates to HL&P, TP&L, DP&L, and TESCO. By memorandum dated July 1, 1976,[1] the General Counsel concluded, ". . . the four systems are, and have been . . . Texas intrastate systems, not "public utilities". The Commission adopts its General Counsel's conclusion and therefore dismisses Applicant's request for relief pursuant to Section 202(b) of the Federal Power Act on the basis of no jurisdiction.

Based upon the representations of LCRA and other of the participants in this matter it does not appear that a physical operating condition now exists within the State of Texas which would warrant this Commission taking action under Section 202(c) of the Federal Power Act.

However, we are ordering the Staff to commence a Section 202(a) study to update and amend as necessary the 1972 staff report entitled "Study of Proposed Interconnection Between Electric Reliability Council of Texas and Southwest Power Pool."

[1] Appendix I to this order.

An examination of the pleadings filed in this proceeding has led us to conclude that conditions do warrant action under Section 202(d) to forestall probable operating difficulties pending resolution of this proceeding, and that an "emergency" within the meaning of Section 202(d) of the Act now exists. No major transmission system outage within the ERCOT system from the time WTU began service to the three Oklahoma cities on May 4, 1976, through the date of this order has occurred. However, the "emergency" contemplated by Section 202(d) does not require the *fait accompli* of an actual outage of service or even such preliminary indications of system instability as frequency excursions and/or voltage reductions. Such an interpretation would place this Commission in the untenable position of only being able to act when an outage occurs, even though the possibility of the occurrence of such an emergency may be predictable, and discernable by the exercise of the Commission's expertise, as in the instant case.

We find that the public interest here clearly requires that action under Section 202(d) be taken by the Commission because the facts indicate that there is a reasonable probability of a major outage which may be averted through reestablishment of the interconnections due to one or more problems arising from (1) generating facilities, (2) primary and secondary bulk transmission facilities, or (3) other unforeseen causes including fuel shortages.[2]

[2] The Texas Company, Docket No. E-6115 7 FPC 364; Gulf Oil Corp., Docket No. IT-6055, 6 FPC 685; Kansas Power & Light Co. and Kansas Gas and Electric Co., Docket Nos. E-6116 and E-6110, 7 FPC 452; Central Maine Power Company, Docket No. F-6247, 8 FPC 1248; Kansas Power & Light Co., Docket Nos. E-6568 and E-6749 19 FPC 39; The Kansas Power & Light Co., Docket No. E-6568, 13 FPC 1315 Homestake Mining Co. Docket No. IT-6093, 6 FPC 1076 [sic].

Furthermore, we do not find that the definition of "emergency" concerning Section 202(d) found in Section 32.20 of our Rules and Regulations confine our finding of an "emergency" to the actual failure of facilities as stated in that section. We will in the future as we have in the past apply Section 32.20 to include conditions which show reasonable probability in our determination of emergency conditions under Section 202(d) of the Act.

An additional concern to this Commission are those utilities which are dependent to a significant extent on gas supplied by Lo-Vaca Gathering Company and/or Coastal States Gas Producing Company, subsidiaries of Coastal States Gas Corporation.[3]

The bifurcation of the Texas Interconnected System has resulted in the greater sensitivity of frequency change for a given loss of generation and the increased operating cost resulting from carrying a higher spinning reserve level than that required when the ERCOT system is totally interconnected. The loss of load probability has been increased due to the loss of capacity availability on a common basis. As a result, the capability of the power systems to respond to a single event or a sequence of events such as

[3] At the present time, CP&L depends on gas supplied by Coastal States and/or Lo-Vaca for about 53% of their fuel supply. The Cities of Austin and Brownsville, CPSB, LCRA, South Texas Electric Cooperative, and Medina Electric Cooperative are virtually 100% dependent. (FPC Form 423, 1975) TP&L, DP&L and TESCO may also face gas supply difficulties in the event of a Lo-Vaca bankruptcy. A portion of the gas which these companies purchase from their wholly-owned subsidiaries, Texas Utilities Fuel Company and Old Ocean Fuel Company is transported through the Lo-Vaca system. Furthermore, their principal outside fuel supplier, Lone Star Gas Company, Division of Enserch Corporation is dependent on Lo-Vaca for about 20% of its system requirements. Cf. Homestake Mining Co., Docket No. IT-6093, 6 FPC 1076.

loss of the largest plant, loss of the largest transmission line, etc., is reduced. Moreover, voltage levels are highly likely to be affected adversely in this mode of operation. We find that it is in the public interest to take action to ensure maximum system reliability when remedies are available to this Commission.

Section 32.20 (18 CFR 32.20 et seq.) contemplates power and energy transfers without jurisdictional consequences flowing therefrom, when connections are authorized. Conditions as contemplated by Section 202(d) cover factual situations of the type here before the Commission. The May 5, 1976, request of LCRA and their Response of May 19, 1976, to the Motion of WTU and CP&L, falls within the scope of that section and the Commission will treat it as such. Based upon those filings and other information available within the files of the Commission, the conditioned disconnection of the foregoing systems creates conditions which are unforeseen occurrences and not within the power of LCRA to prevent and which may render it unable to provide service to its customers. The Commission is, therefore, authorizing pursuant to Section 202(d) of the Federal Power Act all of the affected systems to temporarily reestablish their previously operational interconnections, pending further Commission order in this matter.

The Commission finds:

(1) Intervention by the Lower Colorado River Authority, Houston Lighting & Power Company, Dallas Power & Light Company, Texas Electric Service Company, Texas Power & Light Company, City Public Service Board of San Antonio, and Cities of Altus, Frederick, Cordell, Mannford, Oklahoma (Cities); Verdigree Valley Electric Coop, Inc.; Indian Electric Cooperative, Inc.; the Municipal Electric

Systems of Oklahoma and the Arkansas Electric Cooperative Corporation in this proceeding are in the public interest.

The Commission orders:

(1) Central Power & Light Company and West Texas Utilities Company are "public utilities" pursuant to Section 201 of the Federal Power Act (18 U.S.C. 824 [sic]) and therefore subject to the jurisdiction of this Commission.

(2) Houston Power & Light Company, Dallas Power and Light Company, Texas Power and Light Company and Texas Electric Service Company are not "public utilities" pursuant to Section 201 of the Federal Power Act (18 U.S.C. 824 [sic]) and therefore are not subject to the jurisdiction of this Commission.

(3) The Motions of CP&L, WTU *et al.* filed on June 21, 1976, and July 6, 1976, are hereby denied.

(4) The Commission hereby authorizes HL&P, TESCO, DP&L, and TP&L to maintain as temporary connections within the meaning of Section 202(d) of the Federal Power Act all physical interconnections which those systems maintained and operated prior to May 4, 1976, with the systems of CP&L, WTU, LCRA, City of Austin and City Public Service Board of San Antonio.

(5) The authorization of the temporary connections as referred to in paragraph (3) [sic] shall continue until further Commission order. During the period that these temporary interconnections are utilized, HL&P, TESCO, DP&L, and TP&L shall not be determined to be "public utilities" under the Federal Power Act by reason of operations under the interconnections.

(6) The Application of May 4, 1976 and the May 13, 1976 "Motion of Central Power and Light Company and West Texas Utilities Company for permanent and Emergency Interconnection Pursuant to Section 202(b) and (c) of the Federal Power Act" are dismissed.

(7) The Commission hereby orders the Staff of the Federal Power Commission to commence a Section 202(a) study to update and amend as necessary the 1972 staff report entitled "Study of Proposed Interconnection Between Electric Reliability Council of Texas and Southwest Power Pool."

(8) Lower Colorado River Authority; Dallas Power and Light Company; Texas Electric Service Company; Texas Power and Light Company; City Public Service Board of San Antonio; Cities of Altus, Frederick, Cordell, Mannford, Oklahoma (Cities); Verdigree Valley Electric Coop., Inc.; Indian Electric Cooperative, Inc.; the Municipal Electric Systems of Oklahoma and the Arkansas Electric Cooperative Corporation are hereby permitted to intervene in these proceedings subject to the rules and regulations of the Commission; *Provided, however,* that participation of such intervenors shall be limited to matters affecting asserted rights and interests as specifically set forth in their petitions to intervene; and Provided, further, that the admission of such intervenors shall not be construed as recognition by the Commission that they might be aggrieved because of any orders of the Commission entered in this proceeding.

(9) The Secretary is hereby directed to cause this order to be published in the Federal Register and in addition, is hereby directed by mail to provide a copy of this order to all members of the Electric Reliability Council of Texas

(ERCOT) and to all members of the Southwest Power Pool (SWPP).

By the Commission. Commissioner Watt, concurring in part and dissenting in part, filed a separate statement appended hereto.

(S E A L)

Kenneth F. Plumb,
Secretary.

Docket No. E-9558

APPENDIX I

July 1, 1976

MEMORANDUM TO: The Commission

FROM: General Counsel

SUBJECT: Jurisdictional Status

Pursuant to your request at yesterday's Commission meeting, I have reviewed the question of "public utility" jurisdictional status as it relates to the operation of Dallas Power & Light Company, Houston Power & Light Company [sic], Texas Electric Service Company, and Texas Power & Light Company.

As defined in the Federal Power Act, a "public utility" means any person who owns or operates facilities subject to the Part II jurisdiction of the Commission, § 201(e). Facilities of that type are facilities for the transmission or sale at wholesale for resale of electric energy generated in one state and consumed in another, but not facilities for generation, facilities used in local distribution, facilities for the transmission of electric energy in intrastate commerce or facilities for the transmission of electric energy consumed wholly by the transmitter, § 201(b) (c). My conclusions are fourfold:

> Prior to May 4, 1976, the aforementioned four systems were operating in electrical isolation from any electric system which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they were not susceptible to classification as "public utilities";
>
> During May 4, 1976, from 5:30 a.m. to 3:43 p.m., the aforementioned four systems operated in parallel — or electrical synchronizism [sic] — with other electric

utilities which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they were susceptible to review by the Commission as to their "public utility" status;

Subsequent to May 4, 3:43 p.m., the aforementioned four systems have been operating in electrical isolation from any electric system which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they are not susceptible to classification as "public utilities"; and

During the 10-hour period of synchronous electrical operation on May 4, the facilities and operations of the aforementioned systems were, for all practical purposes, those for the transmission of electric energy in intrastate commerce,* and such systems fall within the Commission's rule of determining "public utility" status based upon the overall characteristics of the electric system's operations, notwithstanding some interstate transmission of electric energy. See attached letter of the Commission dated May 28, 1965, *Home Light and Power Company.*

"Public utility" status** under the Federal Power Act is determined by an engineering and scientific factual showing, resting upon substantial evidence, that an electric system's facilities are used for the transmission or sale of energy generated in one state and consumed in another. *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 463 (1972). Most recent Commission cases as referred to by the

* And/or facilities for generation, for local distribution, or facilities for the transmission of electric energy consumed wholly by the transmitter.

** A company may make no jurisdictional sales and still be found to be a "public utility." In such instances, the company would not have wholesale rate schedules on file under §§ 205 and 206, but such company could be a "public utility" subject to regulation under the other sections of Parts II and III applicable to public utilities, (e.g., §§ 202(b), 203, 204, 301, and 305 of the Power Act).

Supreme Court in that case have reviewed the nature of an electric system's operations and have applied to the transmission networks, an electromagnetic unity of response/commingling theory to comprise the necessary showing for public utility status. For purposes of this memorandum, I have assumed and equated synchronous electrical operation with electromagnetic unity of response and commingling. I have further assumed the overall intrastate character of the aforementioned four Texas systems which Justice Douglas recognized in his dissent to the Court's opinion in *Florida Power & Light Co.*, 404 U.S. 474.

Applying the Commission's *Home* ruling, I conclude that the four systems are, and have been throughout the three time periods, Texas intrastate systems, not "public utilities." The legal authority for the Commission to apply, the *Home* ruling, rests upon the Supreme Court's holding in *Connecticut Light and Power* v. *FPC*, 324 U.S. 515, 536 (1945):

> * * * Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations. [***]

/s/ DREXEL D. JOURNEY

Drexel D. Journey

*** How the Commission will exercise such discretion depends upon the particular facts before it; i.e., largely those concerned with patterns of physical operation of the utilities and the purposes which FPC controls would serve in light of Federal/state regulatory interests. See *City of Colton*, 26 FPC 223, 236 (1961), affirmed *sub nom, FPC v. Southern Cal Edison*, 376 U.S. 205 (1964); and *Florida Power & Light Co.*, 37 FPC 544, 552 (1967).

3. Furthermore, it is difficult for TUS to determine whether CP&L and WTU are even claiming an emergency, as that term is defined in the rules and regulations of this Commission, in light of their wholly inconsistent positions expressed this past week to the United States District Court for the Northern District of Texas (District Court) and to the Public Utilities Commission of Texas (PUC). We believe that the underlying motives of CP&L and WTU are crystal clear when their latest action is viewed in context with the chronology of events of the recent past. These events should be considered by this Commission in evaluating the action to be taken on the Motion now pending before it.

1975 — Following complaints that CSW is not an integrated public utility system within the meaning of Section 11 of the 1935 Act, CSW proposes the pervasive integration of the Texas Interconnected System (TIS), including the TUS companies and Houston Lighting & Power Company (HLP), with the Southwest Power Pool (SWPP).

1975 — TUS rejects the CSW proposal.

January 5, 1976 — CSW serves its Supplemental Memorandum filed with the Securities and Exchange Commission (SEC) proposing the same pervasive integration of TIS and SWPP, and at page 8, threatens that "in the event that their (TUS and HLP) cooperation is not forthcoming on a voluntary basis, other options for securing necessary cooperation will be considered."

January 30, 1976 — CSW's status as a single integrated electric holding company within the meaning of Section 11 of the 1935 Act questioned by the SEC in Admin. Proc. File No. 3-4951.

May 3, 1976 (4:50 p.m.) — CP&L and WTU file suit in the United States District Court seeking, among other things, an order to prevent TESCO from disconnecting from WTU, alleging that they are certain that when TESCO becomes aware of any institution of interstate service by WTU it will disconnect its ties with WTU.

May 4, 1976 (5:30 a.m.) — WTU breaches its long-standing contract with TESCO by instituting service to Oklahoma from its previously intrastate generating facilities.

May 4, 1976 (Approx. 9:00 a.m.) — CSW files a petition with the Federal Power Commission seeking, among other things, a determination that as a result of the short period of time when TESCO was involuntarily interconnected with WTU while it was selling power to Oklahoma, TESCO became a public utility within the meaning of Section 201 of the Act.

May 4, 1976 (11:00 a.m.) — TUS is made aware of the interstate tie and disconnects from WTU at 3:43 p.m.

May 4 1976 (5:00 p.m.) — CP&L and WTU seek and are refused a temporary restraining order by the District Court prohibiting TESCO from disconnecting or, in the alternative, requiring it to reconnect with WTU, on the basis that irreparable injury and harm would result to CP&L and WTU if TESCO were permitted to disconnect or not ordered to reconnect its facilities with those of WTU.

May 4 1976 (5:30 p.m.) — After being denied the temporary restraining order, CP&L and WTU ask the District Court to enter an order requiring them to cease interstate service to Oklahoma.

May 4, 1976 (5:40 p.m.) — After the District Court refuses the request by CP&L and WTU to order them to cease interstate service to Oklahoma, CP&L and WTU offer to discontinue interstate service if TESCO will reconnect, under a written agreement, with WTU.

May 4, 1976 (5:40 p.m.) — TESCO accepts the proposal and agrees to reconnect its ties with WTU.

May 5, 1976 (11:00 a.m.) — CP&L and WTU, by telephone, state they have changed their minds and withdraw their offer to discontinue interstate service to Oklahoma.

May 6, 1976 — WTU and CP&L submit an order to the District Court denying their motion for a temporary restraining order indicating in their transmittal letter that "The Plaintiffs have decided not to voluntarily disconnect their service into Oklahoma so that the Defendants will voluntarily reestablish automatic connections with the Plaintiffs. It is also the Plaintiffs' belief that rights already exist which will provide for the resumption of service in the event of an emergency, and that a written agreement with the Defendants in this regard is not required."

May 7, 1976 — CP&L and WTU testify under oath in a hearing called by the PUC that no emergency exists and that they have no need for interconnection with TUC or HLP.

May 7, 1976 — The PUC finds that no present emergency exists on any electric system operating in Texas, including CP&L and WTU, and orders all electric generating companies in Texas, including CP&L and WTU to report to it on May 21, 1976 which system — an intra-state . . . [SIC]

Docket No. E-9558

FEDERAL POWER COMMISSION

Washington, D. C. 20426

May 28, 1965

Home Light & Power Company
810 Ninth Street
Greeley, Colorado

Attention: Warren A. Terry, President

Dear Sirs:

The Commission has reviewed the available information regarding the operations of Home Light & Power Company in the light of Mr. Terry's testimony on S. 218 before the United States Senate Commerce Committee on Thursday, May 13, 1965. Without making any definitive determination of the questions raised by Home's contention that it is not a "public utility" within the meaning of the Federal Power Act, but without prejudice to any claim of Home to complete exception, it is apparent that Home's facilities and operations are for most practical purposes those of a local distribution company. In these circumstances the Commission sees no present necessity for exercising such jurisdiction as it may have to require Home's compliance with the Commission's accounting regulations.

Accordingly, you are advised that Home is not being required to take any present action which might be necessary to bring its books of account into compliance with the Commission's Uniform System of Accounts and is excused from the requirement thereof for the filing of reclassification and original cost studies of electric plant. Home will, of course,

continue to be required to file the informational reports provided for in accordance with the provisions of section 311 of the Federal Power Act which expressly applies to all electric utilities whether or not they fall within the Acts' [SIC] definition of "public utilities".

By direction of the Commission.

J. H. Gutride
Secretary

Central Power & Light Company,
Public Service Company of Oklahoma,
Southwestern Electric Power Company, and
West Texas Utilities Company
} Docket No. E-9558

(Issued July 21, 1976)

WATT, Commissioner, *concurring in part and dissenting in part*:

For the most part, I agree with today's decision. I emphatically agree that Houston Power and Light Company, [SIC] Dallas Power and Light Company, Texas Power and Light Company and Texas Electric Service Company are not subject to FPC jurisdiction. The Commission should not condone such blatant attempts as has occurred here to force jurisdiction upon otherwise non-jurisdictional companies.

I must, however, dissent to the Commission's finding that an emergency exists within the meaning of Section 202(d) of the Federal Power Act. Based on the statements of the Public Utility Commission of Texas and the FPC Bureau of Power, I simply cannot reach a conclusion that an emergency exists. For reasons which I do not understand, the majority insists on creating by definition an emergency. An emergency which cannot be defined or terminated by events other than FPC administrative action.

Today's decision stands for the proposition that the FPC can allow electricity to flow between jurisdictional and non-jurisdictional companies on a day-to-day basis in anticipation of a future emergency. I am not aware of any case which is similar to this and do not believe it wise

to break such "new ground" given the facts which are before us. Earlier cases dealt with by the FPC allowed permanent facilities to be built for anticipated emergencies but required that the ties remain open until the real emergency came into being.

Today's action allows the creation by definition of an emergency to allow the interconnection of interstate and intrastate systems without bringing about federal jurisdiction. I like the result but not the legal fiction created to get there.

I share my fellow Commissioners' concern for the maintenance of reliable service within the ERCOT group. I also agree it is the Commission's purpose to assure as far as is reasonably practicable against any devastating effects which could follow any such emergency.

The filing of appropriate applications and the issuance of orders by this Commission after the onset of any such emergency could result in an intolerably long (even if only several hours) disruption in service. To permit the previously intrastate, interconnected companies to respond without delay to any such emergency, I would declare our intention not to assert jurisdiction over those companies which respond to such an emergency, pending the filing of and ruling upon appropriate pleadings under Section 202(d). If based upon the facts adduced the Commission then were unable to determine a bona fide emergency situation exists I would allow those companies which responded in good faith to what appeared to be an emergency situation to return to totally intrastate operations by the reopening of the various ties with the interstate parties. If, on the other hand, the Commission were to find an emergency to exist, it could permit operation under Section

202(d) for the duration of such emergency period with full assurance that otherwise intrastate utilities will not lose their status as companies not subject to the jurisdiction of the Federal Power Commission.

Under such a plan, the Commission would not be forced to strain the traditional definition of an emergency and could adequately protect the public.

/s/ JAMES G. WATT
Commissioner

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman;
John H. Hollomon III, and
James G. Watt.

Central Power & Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and West Texas Utilities Company	Docket No. E-9558

ORDER DENYING REHEARINGS

(Issued September 17, 1976)

On July 21, 1976, the Federal Power Commission in the above-titled docket issued its "Order Rejecting In Part And Accepting In Part Application For Action Pursuant To Section 202." The Commission in its order issued July 21, 1976, ordered *inter alia:*

> (1) Central Power & Light Company and West Texas Utilities Company are "public utilities" pursuant to Section 201 of the Federal Power Act (18 U.S.C. 824 [SIC]) and therefore subject to the jurisdiction of this Commission.
>
> (2) Houston Power & Light Company [SIC], Dallas Power and Light Company, Texas Power and Light Company and Texas Electric Service Company are not "public utilities" pursuant to Section 201 of the Federal Power Act (18 U.S.C. 824 [SIC]) and therefore are not subject to the jurisdiction of this Commission.
>
> (4) The Commission hereby authorizes H&LP [SIC], TESCO, DP&L, and TP&L to maintain as temporary connections within the meaning of Section 202(d) of the Federal Power Act all physical interconnections

which those systems maintained and operated prior to May 4, 1976, with the systems of CP&L, WTU, LCRA, City of Austin and City Public Service Board of San Antonio.

(5) The authorization of the temporary connections as referred to in paragraph (3) [SIC] shall continue until further Commission order. During the period that these temporary interconnections are utilized, HL&P, TESCO, DP&L, and TP&L shall not be determined to be "public utilities["] under the Federal Power Act by reason of operations under the interconnections.

(7) The Commission hereby orders the Staff of the Federal Power Commission to commence a Section 202(a) study to update and amend as necessary the 1972 staff report entitled "Study of Proposed Interconnection Between Electric Reliability Council of Texas and Southwest Power Pool."

On August 20, 1976, applications for rehearing of the Commission's July 21, 1976, order were filed by the following intervenors (1) Arkansas Electric Cooperative Cooperation, (2) the Cities of Altus, Frederick, Cordell, Mannford, and Verdigree Valley Electric Cooperative, Inc. and Indiana Electric Co-op, Inc. and the Municipal Electric Systems of Oklahoma (Cities - Co-ops) and (3) Central Power & Light Company (CP&L), Public Service Company of Oklahoma (PSO), Southwestern Electric Power Company (SWEPCO) and West Texas Utilities Company (WTU) (collectively, Applicants).

Arkansas Cooperative alleges in its August 20, 1976, Application for Rehearing that if it is to experience satisfactory reliability of service, the Southwest Power Pool must be interconnected with the Texas Utilities. In addition, the Cooperative urges that the Commission make a complete and thorough investigation of the matter in which Dennison Dam, a Federal project operated by the Corp [sic] of Engi-

neers and the power marketed by Southwest Power Administration (SPA), is being operated to determine whether the best and most productive use is being made of the interstate water supply from the Red River. The Cooperative further requests, "that the Commission hold the necessary hearings and make a thorough investigation of the consequences of the Texas Companies' stubborn refusal to make the interconnections required to insure reliability and achieve obvious economies."

On August 20, 1976, the Cities - Co-ops filed a Petition for Rehearing of the Commission's July 21, 1976, order in the above-entitled docket. The Cities - Co-ops allege *inter alia*, that the Commission erred in determining that HP&L [sic], DP&L, TP&L and TESCO were not public utilities pursuant to Section 201 of the Power Act. The Cities-Co-ops further allege that it was an error for the Commission to deny the May 13, 1976, Motion of CP&L and WTU for permanent and emergency interconnection pursuant to Sections 202(b) and (c) of the Federal Power Act. Based upon its Petition for Rehearing the Cities - Co-ops request this Commission to institute hearings and to modify its July 21, 1976, order consistent with the arguments presented in its petition.

Applicants, on August 20, 1976, filed an Application for Rehearing of the Commission's July 21, 1976, order in the above-entitled docket. In general, the Applicants Petition for Rehearing alleges that the Commission abused its discretion in failing to conduct hearings in this matter; that the Commission erred in failing to consider the anti-competitive effects of its order, and that the material relied upon was inadequate to support the conclusion that the Texas Companies were not public utilities. Based upon the allegations set forth in their Petition for Rehearing Applicants request that the Commission set this matter for

hearing with respect to the relief requested under Sections 202(a) (b) and (c) of the Federal Power Act.

The Commission finds:

The Applications for Rehearing filed on August 20, 1976, by (1) Arkansas Electric Cooperative Cooperation [sic], (2) the Cities of Altus, Frederick, Cordell, Mannford, and Verdigree Valley Electric Cooperative, Inc. and Indiana Electric Cooperative, Inc. and the Municipal Electric Systems of Oklahoma and (3) Central Power & Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company and West Texas Utilities Company, present no facts or legal principles which would warrant any change in or modification of the Commission's order issued July 21, 1976, in this docket.

The Commission orders:

The Petitions for Rehearing of the Commission's July 21, 1976, order in this docket are hereby denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX E

PART II — REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

Declaration of Policy; Application of Part; Definitions

Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [49 Stat. 847; 16 U.S.C. 824(a)]

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric

energy consumed wholly by the transmitter. [49 Stat. 847-848; 16 U.S.C. 824(b)]

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. [49 Stat. 848; 16 U.S.C. 824(c)]

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale. [49 Stat. 848; 16 U.S.C. 824(d)]

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. [49 Stat. 848; 16 U.S.C. 824(e)]

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty unless such provision makes specific reference thereto. [49 Stat. 848; 16 U.S.C. 824(f)]

Interconnection and Coordination of Facilities; Emergencies; Transmission to Foreign Countries

Sec. 202. [*As amended August 7, 1953.*] (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts

for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment, will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations. [49 Stat. 848; 16 U.S.C. 824a(a)]

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would

impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them. [49 Stat. 848-849; 16 U.S.C. 824a (b)]

(c) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party. [49 Stat. 849; 16 U.S.C. 824a (c)]

(d) During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary

facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided,* That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further,* That upon approval of the Commission permanent connections for emergency use only may be made hereunder. [49 Stat. 849; 16 U.S.C. 824a (d)]

(e) After six months from the date on which this Part takes effect, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate. [49 Stat. 849; 16 U.S.C. 824a (e)]

(f) The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from that State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a

foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this part. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection 202(e). [67 Stat. 461; 16 U.S.C. 824a(f)]

Appendix F

DOCKET NO. 14

RE: THE APPLICATION OF HOUSTON LIGHTING AND POWER COMPANY, ET AL, RECONNECTION OF THE TEXAS INTERCONNECT SYSTEM	THE PUBLIC UTILITY COMMISSION OF TEXAS

Amended Final Order

After hearing and considering all motions for rehearing on July 11, 1977, the Commission hereby amends its final order to be and read as follows:

Houston Lighting & Power Company, herein referred to as HL&P, Texas Power & Light Company, herein referred to as TP&L, Dallas Power and Light Company, herein referred to as DP&L, and Texas Electric Service Company, herein referred to as TESCO, filed with The Public Utility Commission of Texas on January 7, 1977, complaints against West Texas Utilities Company, herein referred to as WTU, and Central Power and Light Company, herein referred to as CP&L, alleging that they had breached their contract with other members of the Texas Interconnect System, hereinafter referred to as TIS, causing a disruption of such system resulting in loss of economical, reliable, and safe electrical service to the rate payers of such interconnected systems, and praying for reconnection of such system as it existed on May 3, 1976.

That subsequently the following parties answered or intervened to become parties to the proceedings in said docket:

1. Central Power and Light Company
2. West Texas Utilities Company
3. Lower Colorado River Authority, herein referred to as LCRA
4. The City of Austin, Texas
5. City Public Service Board of City of San Antonio, herein referred to as CPSB
6. South Texas Electric Cooperative, Inc.
7. Brazos Electric Power Cooperative, Inc.
8. Medina Electric Cooperative, Inc.
9. Western Farmers Electric Cooperative
10. Southwest Texas Electric Cooperative, Inc.
11. Concho Valley Electric Cooperative, Inc.
12. Texas Municipal Power Agency

Based upon the pleadings and evidence submitted during the several public hearings in said docket and in the final hearing of said docket, Federal Power Commission Order in Docket No. E-9583, and Docket No. E-9558, which in compliance with Council's [sic] request during the course of such proceedings and without objections raised during such hearing the Commission takes official notice of, the Commission makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That the TIS had developed over a long period of time, some of such interconnections going back as far as 1924.
2. That as the interconnections increased, the transmission and generating facilities of TIS were de-

veloped to operate in synchronism, so that the loss of any unit on the system automatically caused the other units to increase output to pick up the lost load.

3. That as of May 3, 1976, there were 282 generating units in the TIS synchronous operation.
4. That the TIS prior to May 3, 1976, utilized central planning for operational controls to insure reliability, and stability of the system.
5. That the TIS was not designed to operate in synchronism with the Southwest Power Pool or any other large system.
6. That the TIS cannot operate in synchronism with the Southwest Power Pool or any other large system without the expenditure of large sums of money for new and improved transmission lines.
7. That the costs for adequate transmission lines for the TIS to operate in synchronism with the Southwest Power Pool could equal or exceed one billion dollars.
8. That interconnection with the Southwest Power Pool would not increase the reliability of TIS, but would increase the time required for stablization of the system in case of the loss of load on one of the systems.
9. That the costs for proper interconnections between the TIS and the Southwest Power Pool exceeds the benefits to the rate payers on the Texas Interconnect System.
10. That the rate payers of the TIS can ill afford to carry the extra burden of interconnection with the Southwest Power Pool in addition to the cost of converting the generating facilities of such system so as to use more abundant fuels.
11. That each of the members of the TIS in order to protect themselves against the cost and loss of

stability of interconnection with the Southwestern Power Pool or other large systems had conditioned such interconnection on intrastate operation of each of the interconnected companies through individual contracts or through the terms and conditions of membership in the Electric Reliability Council of Texas, hereinafter referred to as ERCOT.

12. That such condition was contractual and if not covered by individual contracts was part of the terms and conditions of the ERCOT agreement and was predicated upon the fact that once a company enters interstate commerce some other State or Federal Authority may order interconnection regardless of the costs or benefits to the members of the Texas Interconnected System.

13. That if any one of the interconnected companies goes into interstate commerce all the interconnected companies are placed in interstate commerce.

14. That each company should have the choice of operating in the mode which best serves the interest of its customers.

15. That WTU is currently, and was prior to May 3, 1976, operating in intrastate commerce through its southern division, and in interstate commerce through its northern division.

16. That any party to the interconnected system which wishes to withdraw from such intrastate system should first furnish the Commission with complete plans for such withdrawal, together with the costs thereof, as well as sufficient engineering data to establish the reliability of service after withdrawal.

17. That each company in the TIS should have the right to operate in interstate commerce if it so desires provided that it does not increase the costs or lessen reliability to its rate payers as the results of such operations, and provided further

that it first withdraws from the Texas Interconnect System.

18. That all the members of TIS were also members of ERCOT and such interconnections being conditioned on contracts between the various parties, such contracts are presumed to be valid until set aside or voided by a court of general jurisdiction.

19. That the mode of operations by WTU after May 4, 1976, was not in the public interest or the interest of its rate payers, but was done for the benefit of the corporate interest of Central and Southwest Corporation, the holding company owning its common stock.

20. That the mode of operation of WTU subsequent to May 4, 1976, caused the dissolution of the TIS resulting in loss of reliability and increased operating costs for the customers of all the members of the system.

21. That the radial tie into Oklahoma from WTU's southern division did not serve any interest except the Corporate interest of Central and Southwest Corporation, the holding company for WTU and CP&L.

22. That the radial tie into Oklahoma from WTU's southern division on May 4, 1976, resulted in dissolution of the Texas Interconnect System and increased operating costs to all rate payers of all the members of such system.

23. That WTU gave no notice to any other member of the TIS of the radial tie into Oklahoma because the purpose of such tie was to force all members of such system into interstate commerce for the benefit of the corporate interest of Central and Southwest Corporation.

24. That synchronous operations between WTU and the Southwest Power Pool which began August 28,

1976, and continued to January 22, 1977, was unsatisfactory for WTU and all companies interconnected with them because of the wide power swings and delayed stabilization time after an outage.

25. That the corporate interest of Central and Southwest Corporation and the public interest are not necessarily parallel.

26. That the public interest requires electric utilities to maintain such transmission interconnections as are helpful to the reliable and efficient utilization of existing and proposed generation and transmission capacity.

27. That the series of interconnections between and through the TIS has been relied upon historically to provide, and is presently capable of providing the interconnections necessary for the efficient and reliable utilization of the generation and transmission capacity of the electric utilities heretofore interconnected to said system.

28. That the present plant of utilities connected by and through the generation and transmission network of the TIS as of May 3, 1976, is designed in reliance upon said network and depends upon maintenance of said connections for its reliable and efficient operation.

29. That no other system of interconnections is in place or proposed which will reliabily [sic] and efficiently utilize the generation and transmission capacity of existing or proposed plant of the electric utilities heretofore connected.

30. That construction of planned new generation and transmission capacity essential to meet future load growth, and to implement necessary conversion to fuels other than natural gas, requires certainty that the utility systems connected together in the

TIS will remain so interconnected or substantially so, henceforth, insofar as can now be forseen.

31. That the TIS was founded and based upon contractual conditions, either directly or through ERCOT terms and conditions for membership, and its dissolution resulted from the breach of such contractual conditions by WTU.

32. That since the TIS, either directly or through the ERCOT agreements, is founded upon contracts between parties hereto, even if WTU and CP&L claim such contracts are void or voidable as being against public policy, until such contracts are adjudicated to be void or voidable by a final judgment of a court of competent jurisdiction, this Commission should not require a reconnection which would force any party to waive its rights under a contract entered into in good faith between the parties hereto with respect to the formation and operation of such system.

33. That there is presently pending in the Federal District Court for the Northern District of Texas, sitting at Dallas, Texas, an action to determine whether such contracts are void or voidable, and this Commission has neither the jurisdiction nor the inclination to pre-empt said Court on the matter.

34. That a radial tie off WTU's southern division system which on May 1, 1977, was serving few customers in Oklahoma had no significant economic impact, and since the Order in Federal Power Commission Docket No. E-9583 had no jurisdictional impact, but was maintained solely for the purpose of precluding a reconnection of the TIS unless all other parties should agree to waive their contract rights as to the character and operation of such system.

35. That this Commission is not concerned with the question of whether the TIS or any member thereof operates in intrastate or interstate commerce, but instead is concerned only with the public interest.

36. That the radial tie from WTU's southern division into Oklahoma is contrary to the terms and conditions of the ERCOT agreement which constitute a part of WTU's contract with other members of the TIS and is an impediment to the reconnection of such system and is not in the public interest and should be removed or disconnected.

37. That to order a reconnection of the TIS without the removal of such radial tie would compel TP&L, DP&L, TESCO and HL&P to operate contrary to the terms of their interconnection contracts, and would in effect usurp the rights of the Federal District Court to pass on the validity of such contracts.

38. That existing transmission facilities of WTU are not capable of sustaining synchronous operations between the utility systems connected through the TIS and those connected through the Southwest Power Pool, and the additional high-voltage transmission facilities which would be necessary in Texas electrically to sustain such synchronous operations are not presently in place or under construction or covered by certificates of convenience and necessity or by applications for such certificates.

39. That the existing plant of CP&L is not capable of providing reliable low-cost electric power and energy if disconnected from the generation and transmission interconnections which existed through the TIS as of May 3, 1976.

40. That the public interest requires the maintenance of the series of interconnections existing on May 3,

1976, between the electric utilities then interconnected by and through the TIS.

41. That pursuant to the interim order of this Commission of May 2, 1977, the interconnections of the TIS have been restored as they existed on May 3, 1976, and that WTU has disconnected its northern division facilities from that portion of its system interconnected with the TIS.

42. That CP&L and WTU have given notice of their intention to challenge the authority of this Commission to enter any order affecting in any way the flow of electricity across state boundaries on the grounds that such orders are violative of the supremacy clause and the commerce clause of the Federal Constitution.

43. That the period between May 3, 1976, and May 2, 1977, during which the TIS was bifurcated, was characterized by reduced reliability, increased spinning reserves, higher costs, and greater consumption of natural gas than had been the period preceding May 3, 1976; that such undesirable conditions can be expected to recur if this Commission were to permit the TIS again to be bifurcated.

44. Although at this time the Commission does not find an immediate need for the expansion of the TIS into a power pooling network, neither does this Commission reject its responsibility to provide for such an arrangement at such time in the future, if any, when it would benefit the rate payers of the State of Texas.

45. That the objections and exceptions to the final order herein contained in the motions for rehearing except to the extent adopted herein should be overruled for want of merit.

Conclusions of Law

1. That the Commission has jurisdiction over the parties.

2. That utilities which undertake to provide electric utility service in the State of Texas are under a duty to provide and maintain such service, instrumentalities and facilities as shall be adequate, efficient and reasonable for the provision of such service irrespective of whether such utilities also provide service to or receive service from other states or are subject to the jurisdiction of the Federal Power Commission.

3. That the State of Texas has the authority and power to insure that utilities providing service in this State meet their public utility duties irrespective of whether such utilities also provide service to or receive service from other states or are also subject to the jurisdiction of the Federal Power Commission and that such power and authority is vested in this Commission.

4. That the incidental and insubstantial effect upon interstate commerce of the exercise of such jurisdiction in this case does not constitute an undue burden on interstate commerce.

5. That this Commission has the power to compel interconnection of utilities in the public interest.

6. That the public interest requires this Commission to order the immediate and permanent reconnection of the interconnection between the utility systems comprising the Texas Interconnected System.

7. That this Commission has no jurisdiction to adjudicate the validity or invalidity of the contractual obligation of WTU to refrain from interstate sales of electric energy through its southern division system.

8. That there is no showing in this proceeding that the public interest requires or would justify this Commission in relieving WTU of its contractual obligations or requiring HL&P, TESCO, DP&L or TP&L to waive their contract rights within the standards pronounced in *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), and *High Plains Natural Gas Co. v. Railroad Commission of Texas*, 467 S.W. 2d 532 (Tex. Civ. App. — Austin 1971, *writ ref'd n.r.e.*).

ORDER

The following, therefore, is the ORDER of this Commission:

1. The Interim Order of this Commission of May 2, 1977, and the actions of the parties pursuant thereto, are confirmed and approved; the said Interim Order is now incorporated into this amended Final Order by reference.

2. All interconnections presently in existence between the utility systems comprising the TIS, together with all such future interconnections as may hereafter be established between them with the approval of this Commission shall henceforth remain connected, unless, upon application to this Commission and notice to all parties to this proceeding, this Commission shall find that and proposed disconnection would serve the public interest.

3. WTU may block over electric loads between its northern division system and its southern division system which does not result in the interstate transmissions or sale of electric energy by or at the southern division system.

4. WTU is prohibited from re-establishing a connection between the southern division of its system which is now connected to the TIS and the north-

ern division of its system being that segment which is not now so connected, unless:

A. The contractual prohibitions against interstate sales shall be finally adjudicated to be void or voidable.

B. This Commission shall authorize or the Federal Power Commission shall order a connection, or

C. A court of competent jurisdiction shall order WTU to take action inconsistent with the foregoing prohibition.

5. WTU operating through its southern division and all other operating utility systems connected with the TIS are prohibited from making connections with utility systems not so connected or with segments thereof and from providing service outside of their certificated areas, unless:

A. The service is authorized by specific provisions of The Public Utility Regulatory Act, Art. 1446(c) V.A.C.S.

B. The Federal Power Commission shall order such a connection or,

C. This Commission shall authorize such a connection or service, (a) to cope with an emergency or (b) upon application, notice to all parties hereto, and finding that the proposed interconnection or service would serve the public interest.

6. That any party to the interconnected system which wishes to withdraw and disconnect from such intrastate system shall furnish the Commission with complete plans for such withdrawal together with the costs thereof, as well as sufficient engineering data to establish the reliability of service after withdrawal and disconnection.

7. That such information required in Section #5 above shall:

A. Be given to the Commission at least thirty days prior to the planned withdrawal and disconnection,

B. Such notice of the planned withdrawal and disconnection shall be given to each member utility of the TIS at least thirty days prior to the planed withdrawal,

C. The cost information provided to the Commission shall be sufficient to allow the Commission to determine the probable economic impact of the planned withdrawal on the rate payers of both the withdrawing utility and the rest of the TIS utilities,

D. The engineering information provided to the Commission shall be sufficient to allow the Commission to determine the probable impact of the planned withdrawal and disconnection on the system reliability of both the withdrawing system and the rest of the TIS utilities.

E. The rest of the members of the TIS, within ten days of receiving notice from the member utility of its planned withdrawal and disconnection, shall file jointly or individually with the Commission, information regarding the probable impact of the planned withdrawal on system operating costs and system reliability, and notice of any significant changes in TIS operation which the planned withdrawal and disconnection will necessitate.

8. Members of the TIS shall file with the Commission every six months a report detailing the utility's fuel conversion program. The report should provide information on present fuel mix, conversion

achieved in the reporting period, and conversion scheduled in the coming period. Information should be provided for all available capacity and the actual capacity used. Information should be provided describing the utility's fuel acquisition program to meet the conversion schedule described. The reports shall be due January and July 1st of each year.

9. Members of the TIS shall file monthly with the Commission a record of all forced outages experienced by the utility during the reporting period. The report should include the date, size (MW) duration and probable cause of the outage. The report shall also provide the MW remaining in service during the outage, the coincident system peak during the outage, and the percentage generating capacity reserve of the system at its lowest point during the outage. The report should detail any load interruptions, frequency changes, or other alterations in normal service, if any, which were undertaken by the utility during the period of outage. The report shall be due at the Commission not more than thirty days after the reporting period.

10. Each party hereto which is connected to the TIS and which shall henceforth file an application with this Commission for certification of transmission facilities, shall give immediate notice to all other parties to this proceeding of the filing of such application.

11. Each numbered paragraph of this Order and each supplemental Order which may be entered pursuant hereto, is intended to be and is severable from each other numbered paragraph of this Order and each supplemental Order pursuant hereto. The invalidation of any numbered paragraph of this Order or of any supplemental Order which may be entered pursuant hereto, shall in no wise affect any other numbered paragraph of this Order or any other supplemental Order, but the same shall remain in full force and effect.

12. All motions, objections and requested findings of fact and conclusions of law not included in the above findings and conclusions are hereby overruled for want of merit of each of them.

13. The failure of any party or parties to make compliance with this Order shall subject the defaulting party or parties to all penalties provided in the law for violation of an Order of this Commission.

14. The motions for rehearing, except to the extent that the grounds therefor are incorporated in this Amended Final Order, are overruled for want of merit.

ENTERED AT AUSTIN, TEXAS, this 11th day of July, 1977.

SIGNED: /s/ GARRETT MORRIS
Garrett Morris

SIGNED: /s/ ALAN R. ERWIN
Alan R. Erwin

SIGNED: /s/ GEORGE M. COWDEN
George M. Cowden

ATTEST:

/s/ ROY J. HENDERSON
Roy J. Henderson
Commission Secretary and
Director of Hearings

Appendix G

SUMMARY OF ADMINISTRATIVE PROCEEDINGS AND RELATED LITIGATION INVOLVING CENTRAL AND SOUTHWEST CORPORATION, TEXAS UTILITIES COMPANY AND HOUSTON LIGHTING & POWER COMPANY

1.

Securities and Exchange Commission Administrative Procedure File No. 3-4951

On March 26, 1974, a motion was filed with the SEC by the Oklahoma Cities of Altus, Frederick, Cordell and Mannford and Verdigree Valley Electric Cooperative and Indian Electric Cooperative, Inc. requesting, among other things, that the SEC undertake a review of the status of Central and South West Corporation ("CSW") and its subsidiaries under the Public Utility Holding Company Act of 1935 ("1935 Act").

On December 31, 1975, CSW filed a memorandum with the SEC reporting on the conclusion of an initial engineering study undertaken by a consulting firm for CSW which evaluated several alternative modes of future operation of its system, some of which involve interconnecting facilities of the subsidiaries of Texas Utilities Company ("TU") and adjacent utilities, with existing and proposed interstate facilities of CSW.

On January 30, 1976, the SEC issued a Notice of and Order for Hearing relating to the economical operation of the electric utility facilities of the subsidiaries of CSW as a single integrated and coordinated system under the 1935 Act and the various plans referred to in the memorandum.

A pretrial conference in this case was scheduled on May 12, 1976, one week after the events triggered by WTU's commencement of interstate service from its Texas intrastate system on May 4, 1976. The issues are:

1. Whether the electric utility facilities of the subsidiaries of CSW, supplemented as planned or proposed, are capable of being economically operated as a single integrated and coordinated system;
2. Whether the proposals presented by CSW and its subsidiaries, with any amendments or modifications which may be developed during the proceeding, represent a reasonable prospect of achieving such economical operation, and what contingencies, if any, may affect carrying out any of such proposals.
3. Whether the Commission's determination of February 16, 1945, that the electric utility facilities of C&SW's subsidiaries constituted a single integrated system should be modified or set aside in the event the record in this proceeding does not support a finding now that those facilities are operated as a single integrated system or are capable of such operation under any of the proposals that C&SW has presented to comply with the standards of Section 11(b)(1).

2.

DALLAS FEDERAL DISTRICT COURT SUIT

Hearings in this proceeding have occurred in October 1976, January, February, May and September 1977, and in February and March 1978. Additional hearings are scheduled to resume in December 1978 at which time CSW will complete its direct case.

Texas Electric Service Company and Houston Lighting & Power Company were named defendants in a suit filed against them on May 3, 1976, in the U.S. District Court for

the Northern District of Texas, Dallas Division, by WTU and CP&L. The suit alleges that the maintenance of a policy to operate solely within the State of Texas constitutes an unlawful restraint of trade on a group boycott and concerted refusal to deal in violation of Section 1 of the Sherman Act. The suit generally seeks to require TESCO and HL&P to operate interconnected with the interstate facilities of WTU and CP&L. The Court denied Plaintiffs' request for a temporary restraining order and preliminary injunction. All parties filed motions for summary judgment, all of which were denied by the Court on June 14, 1977. A trial on the merits is scheduled to begin on October 2, 1978.

3.

Public Utility Commission of Texas
Docket No. 14

After being informed that WTU had connected service across the Oklahoma state line and that the TU companies and HL&P had disconnected from the Texas Interconnected System ("TIS") because of this, the PUC called an emergency hearing for May 7, 1976, at which all members of TIS were represented. At the conclusion of this hearing, the PUC found that the interest of the public required the immediate reestablishment of an intrastate interconnected system among the companies which wished to continue to operate intrastate only and issued an interim order requiring, among other things, those members of the TIS wishing to remain in intrastate commerce to commence negotiations immediately for the reestablishment of an intrastate interconnected system, and directing all parties to advise the PUC by May 21, 1976, of the steps taken in this regard. Following receipt of responses from all parties, the PUC, on May 24, 1976, found, among other things, that a Texas

intrastate interconnect system had been reestablished by the reconnection of HL&P and the TU companies and issued a final order permitting, among other things, the reconnection of the other members of TIS with such intrastate system provided any such reconnection did not put the intrastate system into interstate commerce.

On January 7, 1977, DP&L, TESCO and TP&L filed a motion with the PUC requesting that the PUC enter an order requiring WTU and CP&L (i) to appear and show cause why they should not be ordered to return to the pre-May 4, 1976 mode of operation and, pending final outcome of the proceeding, (ii) to cease implementing any plans which would facilitate in any manner interconnected operation with any electric utility outside the State of Texas. The motion alleged that unless the requested order were issued, the conduct of WTU and CP&L may frustrate the proper exercise of PUC jurisdiction and cause irreparable injury to, and result in a significant adverse impact upon, all electric utilities in the State of Texas and their customers. HL&P, LCRA and others also filed similar motions.

At a hearing held on May 2, 1977, the PUC entered an Interim Order in effect requiring all parties to return to the pre-May 4, 1976 mode of operation and WTU to sever its interstate tie into Oklahoma.

On June 2, 1977, following a full hearing, the PUC issued its Final Order which, among other things, confirmed its Interim Order. On July 11, 1977, following a hearing on various motions for rehearing, the PUC entered an Amended Final Order (which is Appendix F) which clarified but did not substantively change its June 2 Final Order. On July 22, 1977, CP&L and WTU filed a motion for rehearing of the Amended Final Order which was denied.

In May, 1977, CP&L and WTU instituted a statutory appeal to the District Court of Travis County, Texas, seeking to set aside the Interim Order issued by the PUC on May 2, 1977. The Plaintiffs' petition was amended on August 2, and September 16, 1977, seeking to set aside the Amended Final Order entered by the PUC on July 11, 1977, and the Interim Order as incorporated therein. The TU companies and HL&P intervened as Defendants in this proceeding in October, 1977. Oral Arguments are scheduled to be heard in this proceeding on November 20, 1978.

In May, 1977, CP&L and WTU also filed a complaint against the PUC in the United States District Court for the Western District of Texas, Austin Division, seeking a declaratory judgment that the Interim Order entered by the PUC is void. On July 29, 1977, CP&L and WTU amended their complaint to seek a declaratory judgment that the Amended Order of July 11, 1977, and the Interim Order as incorporated therein, is void. In October, 1977, the TU companies and HL&P intervened as Defendants in this appeal. In early May, 1978, the United States and the Federal Energy Regulatory Commission intervened as Plaintiffs therein. Upon the motion of the Defendant PUC, joined in by the TU companies, HL&P and other parties which intervened as Defendants, the Court, on May 11, 1978, dismissed the appeal without prejudice to the refiling thereof after the Texas courts have addressed the state law questions in the case. This action by the U.S. District Court is on appeal to the Court of Appeals for the Fifth Circuit.

4.

Nuclear Regulatory Commission
Docket Nos. 50-498A and 50-499A

CP&L is one of four holders of a joint license issued by the Nuclear Regulatory Commission to construct the South

Texas Project, a two-unit nuclear generating station near Bay City, Texas. CP&L, on June 4, 1976, filed a petition to intervene and request for hearing out of time with the NRC, requesting the NRC to conduct an antitrust hearing as a part of construction permit proceedings for the South Texas Project. A Licensing Board of the NRC granted CP&L's request and ordered a hearing. Upon appeal, the Atomic Safety and Licensing Appeal Board, by its Decision dated March 18, 1977, reversed the order granting a hearing and directed that CP&L's petition be dismissed for lack of jurisdiction. CP&L sought and was denied an extension of time to seek reconsideration of the Safety and Licensing Board's order and a request for reconsideration was subsequently denied. Review by the NRC is discretionary and on March 31, 1977, it announced that it had decided not to review the decision of the Safety and Licensing Appeal Board. On May 18, 1977, CP&L petitioned the United States Court of Appeals for the District of Columbia Circuit to review the NRC orders and remand the cause to the NRC with directions to hold a prompt hearing on the antitrust issues raised by CP&L. HL&P has intervened in this appeal.

HL&P, a co-holder of the permit for the construction of the South Texas Project, filed a request on February 10, 1977, with the NRC for a waiver of an NRC rule which would permit the NRC Staff to initiate the operating license antitrust review for the South Texas Project under section 105(c) of the Atomic Energy Act of 1954, as amended. CP&L, in response to the request for waiver, urged that the NRC Commissioners should order a hearing with respect to the antitrust issues raised by its petition to intervene outside the confines of an operating license review under section 105(c) of the Atomic Energy Act of 1954, as amended. The NRC entered an order on June 15, 1977 in

which it declined to direct a hearing, granted HL&P's request for waiver and directed the NRC Staff to seek the further advice of the Department of Justice with respect to the operating license antitrust review for the South Texas Project. On July 26, 1977, CP&L petitioned the United States Court of Appeals for the District of Columbia Circuit to review the June 15, 1977 order of the NRC and remand the cause to the NRC with directions to hold a prompt hearing on the antitrust issues raised by CP&L. CP&L also moved to consolidate this petition for review with the petition for review filed by it on May 18, 1977. The two petitions for review filed by CP&L have been consolidated and briefs have been filed by the parties.

By letter dated February 21, 1978, the Department of Justice, in response to the request of the NRC Staff pursuant to the above-mentioned Order of June 15, 1977, rendered the requested advice, indicated that the intrastate provisions of agreements among TIS members may raise serious antitrust issues, and concluded that changed circumstances required that an antitrust hearing be held on the operating license application. Thereafter, a Notice of Antitrust Hearing on Operating License Application was published in the Federal Register on April 14, 1978. Texas Utilities Generating Company, DP&L, TESCO and TP&L filed a petition to intervene in this proceeding (Docket Nos. 40-498A and 50-499A) on April 28, 1978. By Answer, dated May 16, 1978, the NRC Staff has opposed the petition to intervene filed by the TU companies.

On May 17, 1978, the Atomic Safety & Licensing Board issued a Notice of Special Prehearing Conference in this proceeding to be held on June 21, 1978, at which conference the Board will consider, among other things, the identifica-

tion of key issues in the proceeding, the ruling on intervention petitions, and the establishment of a schedule for further actions in the proceeding.

5.

Other FPC (FERC) Proceedings

Various other motions and petitions are pending seeking relief substantially the same as that sought in the May 4, 1976 and May 13, 1976 petitions of the CSW subsidiaries, as follows:

1. *Docket No. E-9593.* On April 27, 1977, CP&L, PSO, SWEPCO and WTU filed an Emergency Petition for Proceedings and Joint Hearings Pursuant to Sections 307 and 209(B) of the Federal Power Act, requesting that the Commission initiate a proceeding to conduct joint hearings with the Public Utility Commission of Texas concernng the question of intrastate and/or interstate service of Texas interconnected public utility systems raised by the motions filed with the Texas PUC by HL&P and the TU companies on January 7, 1977. This petition was denied by order of the Commission dated July 5, 1977. On July 22, 1977, the Corporation Commission of the State of Oklahoma filed an application for rehearing of the July 5 order, claiming that in its petition to intervene, in addition to its request for intervention, it requested the Commission to institute an investigation pursuant to Section 207 of the Federal Power Act "to determine whether or not adequacy or sufficiency of service to the people of the State of Oklahoma has been affected by the recent disconnection of service between WTU and PSO." The Corporation Commission stated that the Commission failed to address this request in its July 5 order. On August 1, 1977, the Oklahoma Association of

Electric Cooperatives filed an application for rehearing for the same reason, among others, stated by the Corporation Commission. On August 4, 1977, the CSW subsidiaries applied for rehearing of the order for the same reason as the Corporation Commission. On August 18, 1977, the FPC issued an order granting rehearing solely for the purposes of further consideration.

3. Docket *No. E-9578.* On December 22, 1976, Tex-La Electric Cooperative, Inc. filed a petition with the Federal Power Commission, requesting the Commission to commence an investigation to determine whether TP&L engages in interstate commerce, and to determine whether TP&L's wholesale sales are subject to the jurisdiction of the Texas Public Utility Commission or the jurisdiction of the Federal Power Commission, alleging that TP&L receives energy from the Denison Dam, and the "Denison Dam is located in Oklahoma and Texas." On the same date Tex-La filed a similar petition with the Texas Public Utility Commission. Tex-La represents 14 rural electric cooperatives engaged in the distribution and sale of electric power and energy. Tex-La purchases power and energy for the use and benefit of its member cooperatives from TP&L pursuant to a contract dated June 12, 1973. On January 25, 1977, the subsidiaries of CSW and certain Oklahoma consumers filed petitions to intervene in this proceeding. TP&L filed answers asserting that the Tex-La petition should be denied because no jurisdictional interstate energy had been transmitted into or out of the TU system. On October 31, 1977, the Federal Energy Regulatory Commission (successor to the FPC) issued an order, a copy of which is attached as Attachment 4, stating that the issue raised as to the interstate character of transactions in Denison Dam energy was not disposed of by prior FPC orders, permitted intervention

by certain CSW subsidiaries and others, and ordered a public hearing now scheduled to commence in 1979, concerning the investigation of matters contained in the Tex-La petition relating to whether there has been jurisdictional transmission of interstate energy into or out of the TU system through facilities at Denison Dam.

Supreme Court, U. S.
FILED
SEP 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-318

DALLAS POWER & LIGHT COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY,
Petitioners,

v.

CENTRAL POWER AND LIGHT COMPANY, PUBLIC SERVICE COMPANY OF OKLAHOMA, SOUTHWESTERN ELECTRIC POWER COMPANY, WEST TEXAS UTILITIES COMPANY, CITY OF ALTUS, OKLAHOMA, CITY OF FREDERICK, OKLAHOMA, CITY OF CORDELL, OKLAHOMA, CITY OF MANNFORD, OKLAHOMA, VERDIGREE VALLEY ELECTRIC COOPERATIVE, INC., INDIAN ELECTRIC COOPERATIVE, INC., MUNICIPAL ELECTRIC SYSTEMS OF OKLAHOMA, ARKANSAS ELECTRIC COOPERATIVE CORPORATION, FEDERAL ENERGY REGULATORY COMMISSION, HOUSTON LIGHTING & POWER COMPANY, CITY OF SAN ANTONIO, LOWER COLORADO RIVER AUTHORITY, *Respondents.*

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BRIEF OPPOSING CERTIORARI

Respondents, Central Power and Light Company, Public Service Company of Oklahoma, Southwestern Electric Power Company and West Texas Utilities Company, respectfully pray that the Court deny certiorari of the decision of the United States Court of Appeals for the District of Columbia Circuit, entered herein on April 10, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 575 F. 2d 937 (D.C. Cir. 1978). The court of appeals denied "Petitioner's Petition for Rehearing and Alternatively Suggestion for Rehearing En Banc" in an unreported order. The decision of the Federal Power Commission (now the Federal Energy Regulatory Commission) ("Commission" or "FPC"), issued July 21, 1976, in Federal Power Commission Docket No. E-9558, is unreported. The Commission's order denying a rehearing, issued September 17, 1976, is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 10, 1978. A timely petition for a rehearing *en banc* was denied on May 26, 1978. The petition for certiorari was filed August 24, 1978, and received by these Respondents on August 28, 1978. Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1976) and § 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b) (1976).

STATUTORY PROVISIONS INVOLVED

Sections 201 and 202 of the Federal Power Act, 16 U.S.C. § 824 and § 824a (1976), are set forth as Appendix E to the petition for certiorari.

ISSUE PRESENTED

Should certiorari be granted to review a decision by a court of appeals remanding a case to an administrative agency for the purpose of having that agency articulate the rationale for the determinations made by that agency and take into account such factors as are appropriate to any such determination, where the initial decision of the agency:

> (1) is, on its face, based upon uncertain, if not conflicting, rationales;
>
> (2) fails, without explanation, to give any consideration whatever to substantial allegations of anticompetitive conduct bearing upon the issues before the agency; and
>
> (3) appears to have been based, at least in part, upon factual determinations made in the absence of any hearings whatever;

and no disposition of the case on remand can result in any precedent affecting anyone other than certain Texas public utilities?

STATEMENT OF THE CASE

Before the agency and in the court of appeals, this case involved the Commission's jurisdiction, and exercise thereof, under Section 202 of the Federal Power Act, 16 U.S.C. 824a (1976), to promote, encourage, maintain and direct interconnection between electric utilities in the face of agreements, coercive acts and other illegal conduct designed to avoid such jurisdiction.[1] The only question now pending is whether this Court should exercise its discretion to issue a writ of certiorari to review a routine disposition by a court

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[1] As used in this brief, the terms "interconnection" and "power pool" have the following meanings. "Interconnection" refers to the physical connection of electric power lines so that electricity may be transmitted from one line to the other. "Power pool" refers to a group of interconnected power generating or transmitting entities which in varying respects share their generating and transmission facilities with one another.

of appeals of a petition for review of Commission action. The court below was faced with a hastily drawn agency opinion based upon an uncertain or conflicting rationale and an apparent failure of the agency to consider the factors necessarily bearing upon the proper exercise of its responsibilities and containing factual determinations unsupported by any proper record. The court of appeals did no more than remand the case for clarification of the Commission's reasoning and assurance that all factors relevant to the rationale ultimately employed are given due consideration. As such, the case is inappropriate for review by certiorari.

The recitation of the case that follows is based upon the thin record below—a record based on the pleadings before the agency and other documents of public record since the agency held no hearings at any time in connection with its disposition of the case. In this context, Petitioners' claim in their "Statement of the Case" that "all facts relevant to the resolution of the jurisdictional status of DP&L, TESCO, and TP&L under the Act are admitted by all parties" is totally unfounded. *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 3 (No. 78-318, October Term, 1978) (hereinafter cited as "Pet."). These Respondents do not now make, and never below made, any such alleged "admission". To the contrary, there are disputed issues of fundamental fact relating to the jurisdictional determination and to associated anticompetitive conduct by Petitioners which, by their very nature, are best explored in a hearing, or at least, deserve close scrutiny by the Commission. It is the absence of any such exploration or close scrutiny that, in major part, led the court of appeals to remand this

case. 575 F.2d at 938-39. The petition boldly evades any mention of anticompetitive considerations and thus compels their discussion in the following statement of the case. In light of these omissions, Petitioners' characterization of the jurisdictional facts must be wholly disregarded. It merely discloses a complete loss of perspective and tunnel vision as to the relevant law and facts.

Two of the four C&SW Companies[2] have their retail service areas wholly in Texas: WTU and CP&L. The combined generating capacity in Texas of HL&P[3] and the TU Companies,[4] the utilities which have resisted interconnection with the outside world, is more than six times greater than that of WTU and CP&L. Thus HL&P and the TU Companies dominate the bulk or wholesale power market in Texas.

Before May 4, 1976, WTU, CP&L, the TU Companies and HL&P, together with the cities of Austin and San Antonio, the Lower Colorado River Authority and a few others comprised the Texas Interconnected System ("TIS") (also known, with the addition of certain municipal and cooperative systems, as the

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[2] Central Power and Light Company ("CP&L"), Public Service Company of Oklahoma ("PSO"), Southwestern Electric Power Company ("SWEPCO") and West Texas Utilities ("WTU") are all operating electric utility subsidiaries of Central and South West Corporation ("C&SW") and are collectively referred to herein as the "C&SW Companies".

[3] "HL&P" stands for Houston Lighting and Power Company.

[4] The Petitioners Texas Electric Service Company ("TESCO"), Texas Power and Light Company ("TP&L"), and Dallas Power and Light Company ("DP&L") are all operating subsidiaries of Texas Utilities Company and are collectively referred to herein as the "TU Companies".

Electric Reliability Council of Texas ("ERCOT")). ERCOT is contiguous to, but not interconnected with, the Southwest Power Pool ("SWPP"), which, in turn, is fully interconnected with the entire interconnected electric power network covering roughly the Eastern two-thirds of the United States.[5] Beginning with the period immediately preceding the effective date of the enactment of Part II of the Federal Power Act, the major Texas utilities have attempted to isolate their operations (except under numerous, broad exemptions conferred by the Commission) from any contact with interstate electrical energy. ERCOT is the *only* power pool in the United States which attempts to operate in such isolation.

Before passage of Part II of the Federal Power Act, interconnections existed between the TU Companies and WTU (the service territories of which are wholly in Texas), on the one hand, and certain Oklahoma, Louisiana and Arkansas electric systems on the other. Interconnections also existed between HL&P and interstate systems to the East. Before Part II of the Federal Power Act became effective, the TU Companies and HL&P instigated a plan to isolate their operations from any contact—direct or indirect—with interstate flows of electricity for the purpose of evading the impending jurisdiction of the Commission. This action had the effect of insulating them from compe-

[5] The far Western states are interconnected among themselves but are connected with the Eastern part of the nation through interconnections which are inadequate to provide continuous integrated operations. *See* Congressional Research Service, 94th Cong., 2d Sess., National Power Grid System Study, An Overview of Economics, Regulatory, and Engineering Aspects, 117 (Comm. Print 1976).

tition from utilities operating in interstate commerce in electricity. These utilities severed existing interconnections and jointly refused to deal (interconnect) with any electric power system which was not electrically isolated from electric systems outside Texas and which would not agree to open its interconnections to avoid participation—direct or indirect—in interstate flows of electricity.

The restraints upon the free flow of electricity across state lines were imposed by a combination of companies, including DP&L, TESCO, TP&L and HL&P and could not have been maintained by any single company. These companies rely upon each other heavily for support in the provision of economic, reliable service. Thus, by operating in combination, HL&P and the TU Companies save the enormous expenses inherent in individual, isolated operation.

But the price which these companies have exacted from anyone desiring the benefits of interconnection with them is adherence to their boycott of all companies dealing with interstate utilities.[6] Speaking of these

[6] For example, the written Interconnection Agreement between TESCO and WTU effectively requires a boycott of all who deal with those engaged in interstate transmission or sale of electricity. The relevant provisions read:

> The parties hereto agree that no power or energy transmitted, purchased, sold, delivered or received hereunder by either party hereto is to be transmitted, purchased, sold, delivered or received in interstate commerce, and the parties hereto agree at any time and from time to time to open all the transmission line connections necessary to prevent such transmission or delivery by either party to the other in interstate commerce. The parties further agree that no power or energy will be delivered by either of them to the other under this agreement except power or energy generated within the State of Texas, and that

conditions, the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice has formally[7] advised the Nuclear Regulatory Commission ("NRC") that:

> The competitive consequences of this agreement are the same as those that flow from any group boycott: actual and potential competition are injured. Actual competition suffers when existing systems are disconnected from HL&P and TU, as occurred during May, 1976-May, 1977. Potential competition is foreclosed by reason of adherence to the unconditional, across-the-board ban of all interstate connections regardless of their technological and economic feasibility.[8]

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neither party will transmit any power of energy delivered to it hereunder beyond the limits of the State of Texas or sell any such power or energy for transmission or consumption beyond the limits of said state. Appendix of Central Power and Light Company et al. in *Central Power & Light Co. et al.* v. *Federal Power Commission*, No. 76-1995 (D.C. Cir. May 20, 1977) at 164.

[7] *See* Section 105(c) of the Atomic Energy Act, 42 U.S.C. § 2135 (c) (1970).

[8] Letter of February 21, 1978, to Howard K. Shapar, Executive Legal Director, Nuclear Regulatory Commission, from John H. Shenefield, Assistant Attorney General, Antitrust Division, U.S. Department of Justice re: NRC Dkt. Nos. 50-498A and 50-499A (S. Texas Project), 8-9, Appendix A at 10a. This letter is set forth in full in Appendix A to this brief. The February 21, 1978, letter concerns the operating license for the South Texas Project, Units No. 1 and No. 2, of which HL&P is the managing participant. CP&L is a participant in that project. Another letter to the same effect, dated August 1, 1978, concerns the operating license for Comanche Peak Steam Electric Station, Units No. 1 and No. 2, in which the TU Companies are joint participants. A hearing has been ordered already with regard to the South Texas Project by the NRC. The NRC is considering the Department of Justice advice with regard to the Comanche Peak Station.

> . . . with the increased importance of economic coordination brought about by the fuel situation, and the corresponding increased need and opportunity for coordination between interstate and intrastate utilities, HL&P, together with TU, by agreeing not to interconnect with utilities operating in interstate commerce have the power to and may adversely affect the future competitive situation, in or contiguous to the State of Texas, both between the intrastate systems and between the interstate and intrastate systems.[9]

A central basis for remand of this case by the court of appeals was the failure of the FPC to come to grips in any way with these and related anticompetitive issues either in the context of an informed exercise of discretion or in the context of attempted termination by the TU Companies and HL&P of jurisdictional interconnection by means blatantly in violation of the antitrust laws. The court of appeals correctly refused to adopt the narrow view which Petitioners urged there (several times), as well as here, that jurisdiction (whether discretionary or otherwise) could be summarily terminated by gross violations of the antitrust laws and disregard of the public interest in cost savings available through interconnected operation.

Immediately prior to the institution of proceedings before the Commission, WTU began to provide wholesale service between Oklahoma and Texas by transmitting power to certain Oklahoma communities utilizing facilities previously confined to intrastate service. That same day, May 4, 1976, the C&SW Companies commenced these proceedings before the Commission,

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[9] Appendix A, 14a-15a.

alleging that the TU Companies and HL&P were "public utilities" within the meaning of the Federal Power Act and requesting appropriate orders for maintenance of existing interconnections and for additional interconnections with those utilities under § 202 (b) of the Federal Power Act and an investigation of voluntary interconnection under § 202(a) of that Act.

Shortly thereafter, counsel for the C&SW Companies informed the TU Companies and HL&P that CP&L and WTU (with which they were interconnected) were, by reason of WTU's service to Oklahoma, operating in interstate commerce. In mid-afternoon, the TU Companies and HL&P severed their interconnections with neighboring systems connected directly or indirectly to CP&L or WTU. These actions were taken in spite of the fact that the power flows from WTU to Oklahoma were relatively small in terms of the total interconnected system and certainly had no negative affect upon its reliability.

Subsequently, after motions by several parties for the holding of hearings with respect both to permanent and temporary interconnection, the filing of various interventions and other developments, the Commission issued an order on July 21, 1976, adopting and incorporating a memorandum of its general counsel (the "Memorandum") to the effect that the TU Companies and HL&P were not "public utilities" (subject to Commission jurisdiction). That Memorandum contains the only justification for the Commission's jurisdictional determination. The propriety of that determination was the central issue in the appeal of the Commission's Orders filed by the C&SW Companies. The rationale for that determination as set forth in the

Memorandum is, at best, most unclear.[10] For this reason, the court of appeals remanded the matter to the Commission. 575 F.2d at 938.

In addition, the court of appeals found that the FPC had failed to address the central issue whether the agreement among the utilities in Texas not to transmit electric energy to or from any person involved in interstate commerce was part of a group boycott in violation of the policies, if not the letter, of the antitrust laws. 575 F.2d at 938.

The decision of the court of appeals raises no issue that could be of interest or importance to any significant utility involved in electric generation other than Petitioners and HL&P, which have since 1935 sought

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[10] The principal rationale of the Commission as contained in the Memorandum appeared to be that the "overall characteristics" of the power systems operated by the TU Companies and HL&P were intrastate in nature and, thus, this was a proper case for the Commission to decline to assert jurisdiction over them. No valid support for this rationale can be found in either the statute or the cases decided thereunder. (Moreover, any determination based upon the "overall characteristics" of these companies could not have been reached in any informed manner since the record was, to say the least, most incomplete.) Understandably the Commission abandoned this rationale on appeal and argued that its determination was, for all intents and purposes, *mandated* by WTU's supposed violation of its contract with TESCO. (It did so despite the fact that the authorities relied upon in the Memorandum in connection with the "overall characteristics" test support the view that assertion of jurisdiction is a matter left to the sound *discretion* of the Commission.) However, even on appeal the Commission offered no explanation for its subservience to the provisions of a contract, the legality of which was contested. Instead it simply assumed the validity of these provisions and concluded that its regulatory duties were subordinate to such private arrangements. In any event, this new rationale was not employed by the Commission when it in fact made its jurisdictional determination.

to evade Commission jurisdiction through an illegal conspiracy to isolate ERCOT from the rest of the country. The action of the court of appeals was the mildest and least intrusive possible disposition of a patently inadequate Commission decision—a decision made by delegation to its general counsel, fraught with confusion about the existence and exercise of discretionary jurisdiction and lacking even mention of antitrust and other public interest considerations.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Acted Properly in Remanding the Jurisdictional Determination

Petitioners' first and principal argument is that the court of appeals erred by remanding the jurisdictional determination to the Commission when, as a matter of law, it was required to resolve the jurisdictional issue. (Pet. at 9-12). There is no such rule of law, and no legal error was committed. The petition's strenuous argument for avoiding remand can be motivated only by a desire to avoid exploration of anticompetitive and other public interest issues by the Commission. At this stage, the case is a dispute between private parties involving anachronistic practices, unworthy by traditional standards of this Court's attention, particularly in light of the matters of contemporary pressing national concern that crowd the Court's docket.

As a matter of Supreme Court jurisprudence, Petitioners' argument on its face does not reveal a meritorious claim for certiorari. Even if it were true that the court of appeals had "erred" legally—and it did not—a mere error of law below is not cause for grant of certiorari. *See* Sup. Ct. Rule 19(b). Petitioners would have this Court treat certiorari as if the writ

should issue for any routine claim of legal error. This Court's time and attention cannot be so lightly spent.

Further, the authority cited by Petitioners for their claim of legal error lends no support to their claim. Neither the court of appeals nor any party claims that the agency alone is to make the final and exclusive jurisdictional determination here. *See Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946). Nor did the court of appeals decide that there is to be no judicial review of the agency determination. *See Stark* v. *Wickard*, 321 U.S. 288, 309-10 (1944). Instead, the court of appeals found that the agency decision, due to its lack of clarity, did not enable the court to perform its reviewing function. No judicial function was delegated to the agency; the court of appeals required the agency to explain adequately its decision. After such explanation, and the development of an adequate record, the court can perform its proper function and examine the jurisdictional determination in light of the statutory requirements.[11]

But Petitioners' core argument is that a remand is unnecessary because the Commission had no discretion

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[11] The suggestion (Pet. at 10) that the court of appeals demanded ideal clarity is refuted by any fair reading of the opinion of the general counsel upon which the Commission's action was based and upon which, exclusively, it must be defended. *Bowman Transportation* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974), is not to the contrary. While this Court did speak of upholding agency action of "less than ideal clarity", it emphasized in the very same sentence that "we may not supply a reasoned basis for the agency's action that the agency itself has not given. . . ." 419 U.S. at 285-6, citing *SEC* v. *Chenery*, 332 U.S. 194, 196 (1947). And it was *Chenery* that was the legal basis for the court of appeals' action here. *See* 575 F.2d at 938.

to assert jurisdiction. (Pet. at 10-11).[12] Petitioners must have achieved this insight *after* they briefed their case to the court of appeals, for there they argued (at p. 28):

> In the proceeding presently before this Court, the Commission has properly exercised its discretion and found, on the basis of uncontroverted facts that the TUS companies are not engaged in the interstate transmission or sale of electric energy and are therefore not public utilities subject to its jurisdiction. Brief of DP&L, TESCO, and TP&L, *Central Power & Light Company, et al.* v. *Federal Power Commission,* No. 76-1995 (D.C. Cir. May 20, 1977).

The TU Companies then believed that a discretionary test was involved, and, although it now finds it convenient to argue to the contrary, its prior representations to the court below confirm at least that the court of appeals was sound in reaching the judgment that the agency rationale was most obscure. If the court below found confusion, the TU Companies shared in, and contributed to, this confusion, and may not now be heard to complain of its consequences.

This is neither the time nor the place for the C&SW Companies to attempt to explicate the Memorandum. On its face the Memorandum reveals that it was pre-

[12] Petitioners contend that the court was confused by the argument of counsel for the Commission that, *as a matter of discretion,* the Commission declined to assert jurisdiction. This contention is wholly unfounded. The court was in no way confused by the arguments of the Commission's appellate counsel. It was, however, understandably unable to discern what the Commission's position was with respect to the existence of discretion *based upon the contents of the Commission's Order.*

pared in haste in a single day, leaving no time for a proper investigation of the facts or, one might suspect, the applicable law. There were no hearings to inform the agency or the general counsel. Even if it were proper to base a jurisdictional determination solely on this apparently meager investigation by a member of the staff, the opinion of the general counsel is notable for its lack of clarity and its confusion over the legal standards to be applied.[13]

The C&SW Companies argued to the court of appeals that, under either a discretionary or non-discretionary standard, the Commission had applied the wrong legal test. The C&SW Companies contended that under the test of *FPC* v. *Florida Power & Light Co.,* 404 U.S. 453 (1972), federal jurisdiction follows the flow of interstate energy, irrespective of the amounts involved. Once such flows occur, no further inquiry is necessary. Finally the C&SW Companies argued below that such jurisdiction, once vested, could not be terminated by illegal acts.[14]

Assuming, however, that a principle of discretion governs the assertion of jurisdiction, the C&SW Companies argued below that *a fortiori* jurisdiction must

[13] Its lack of clarity was revealed best by the five briefs filed in opposition to the C&SW Companies' brief in the court of appeals, which among themselves differed dramatically in their statement of the opinion's meaning.

[14] In making this contention the C&SW Companies did not rely solely on the illegal disconnections of May 4, 1976. The C&SW Companies believe that a proper hearing would show that *ab initio* the withdrawal of the TU Companies and HL&P from interstate commerce was the result of a scheme violative of the federal antitrust laws.

exist.[15] The question of discretion could never arise unless the interstate transmission which had occurred was sufficient to create jurisdiction.[16] Thus, the existence of jurisdiction had to be conceded, and the proper question was only whether the FPC should *exercise* that jurisdiction. In those circumstances consideration in hearings of the totality of the circumstances surrounding the interstate transmission is not only proper but *necessary* to the exercise of any informed discretion. Under a discretionary standard, the FPC must fully consider factors, such as anticompetitive activities and potential savings to customers, going beyond the mere duration or volume of any transmission of electric energy from one state to another. *See Gulf States Utilities* v. *FPC,* 411 U.S. 747, 758-59 (1973).

While not deciding which test applies, the court of appeals agreed that antitrust considerations could not be ignored if the Commission relied on a discretionary standard: "[A]ntitrust considerations are relevant when it [the Commission] exercises its discretion subject to a public interest mandate." 575 F.2d 938. As the

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[15] In any event, irrespective of the existence of discretion as to the assertion of jurisdiction over the TU Companies and HL&P, the Commission, of necessity, had jurisdiction to determine the scope of such substantive powers.

[16] Indeed, portions of the Memorandum appear to assume this to be the case.

> "During May 4, 1976, from 5:30 a.m., to 3:43 p.m., the aforementioned four systems operated in parallel—or electrical synchronizism [SIC]—with other electric utilities which transmitted or sold electric energy generated in one state and consumed in another, and, therefore, they were susceptible to review by the Commission as to their 'public utility' status."

Memorandum, Pet. at c-15 and c-16.

court of appeals noted, "there is no evidence in the record that the FERC considered Petitioners' antitrust contentions." *Id.* Upon remand, the court instructed the Commission that in the event "exercise of discretion is involved . . . it must be accompanied by some indication in the record that all relevant factors were taken into account." 575 F.2d at 939. This is consistent with a long line of authority from this Court, including *Gulf States Utilities, supra.* It is clearly not error.

Contrary to Petitioners' claim (Pet. at 12) a remand serves a worthy purpose. It permits the Commission to scrutinize closely Petitioners' anticompetitive behavior, which for too long has been a major barrier to the efficient and economical flow and distribution of the nation's energy resources and to order appropriate relief. Given their record of anticompetitive conduct and insistence upon intrastate isolation, irrespective of the effects of that isolation on the public interest, Petitioners' efforts to overturn the judgment of the court of appeals and thereby avoid any examination of their actions by the Commission, are quite understandable. Petitioners' desires, however justified as a matter of self-interest, provide no basis for intervention by this Court.[17]

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[17] There can be no serious contention that the court's mild and balanced response here is in any way comparable to the judicial overreaching which this Court criticized and reversed in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 98 S. Ct. 1197 (1978). There the court of appeals ordered an agency to engraft upon its procedures its own notions of what fairness required even after the agency had held extensive hearings. The court was asking an agency to do far more than was required by the Administrative Procedure Act and by its own regulations. This Court reversed and pointed out that a court could not demand of an agency more than what the controlling statute and administrative due process require. In the present case,

2. Petitioners' Contention That the Decision of the Court of Appeals Is in Conflict with the Decision of This Court in *Connecticut Light & Power* Co. Is Frivolous

Petitioners now argue, as they have several times before, that by disconnecting electric service along the hundreds of miles where their service territory borders that of the C&SW Companies or intervening utilities in Texas, the TU Companies ousted the FPC of jurisdiction under the Federal Power Act. (Pet. at 14-16). In making this argument Petitioners studiously avoid any reference to the obvious fact that this action constituted a violation of the policies, if not the letter, of the antitrust laws, and was taken in blatant disregard of the public interest. It is only by so disregarding the obvious that Petitioners can assert that the decision below somehow conflicts with this Court's decision in *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515 (1945).

Whatever might have been the situation with respect to a *single company's plans* for *orderly withdrawal* from interstate commerce (as was the case in *Connecticut Light & Power Co., supra*), the Commission cannot be ousted of jurisdiction by concerted implementation of a long-standing conspiracy violative of the antitrust laws, designed to escape federal jurisdiction and having the effect of injuring competition. No case requires the Commission to stand idly by when private entities, such as Petitioners and HL&P, elect

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the agency failed to do what the statute required or to hold any hearings. The record is plainly inadequate by any standard and the agency did not comply with its minimum legal obligation to articulate its reasoning. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). This is vastly different than requiring the superfluous procedures rejected in *Vermont Yankee*.

to so flout the public interest. Thus, *Connecticut Light & Power* in no way supports Petitioners' contentions. Indeed, even in that case this Court remanded the question of the propriety of assertion of jurisdiction to the Commission for the exercise of informed discretion. Its dicta that a single company's plans for orderly withdrawal from interstate commerce may not be improper are entirely irrelevant to the facts of this case. The simple request here by the court of appeals for the FPC to clarify the question if, how and when discretion was exercised, as well as to elucidate its views regarding the closely related antitrust and public interest questions, was inescapable.

3. There Is No Basis for Supreme Court Review Based on the Asserted Conflict with Statutory Language and Intent

Petitioners would invent a new standard for certiorari by suggesting that the remand conflicted with clear statutory language and intent. Such a standard is not supported by reference to a single case or legal authority or, for that matter, by this Court's rule suggesting the appropriateness *vel non* of cases for certiorari. Sup. Ct. Rule 19. Such a contention could be made by *any* unhappy litigant, and would lead to burying the Court in trivial litigation. Here the asserted conflict inflicts no injury since, upon remand, the agency, upon a proper record, could presumably adopt Petitioners' theory. Then, at least, the theory could be judicially tested with the benefit of a proper examination by the agency. But the court's remand *per se* neither conflicts with the statute nor causes Petitioners any cognizable injury.

Nor is there merit to the substance of the TU Companies' argument. The TU Companies' facilities were

used quite recently for the transmission of energy in interstate commerce, on May 4, 1976 at the very least. Decisions of this Court have rejected any *de minimis* test. Once an interstate flow of electricity occurs, no matter how small, FPC jurisdiction attaches. *See FPC* v. *Florida Power & Light Company, supra; Accord, Jersey Central Power & Light Co.* v. *FPC,* 319 U.S. 61 (1943).

Petitioners err fundamentally in ignoring the actions attempting to terminate the flows, both on May 4, 1976, when the group boycott was enforced, and in 1935, when the anticompetitive arrangements to evade FPC jurisdiction began. The authorities cited by Petitioners do not concern concerted withdrawals from service in furtherance of anticompetitive schemes to restrain the interstate flow of electricity.

Even recognition of the right of a utility unilaterally to withdraw from interstate commerce would not establish any principle that FPC jurisdiction ends when utilities act in concert to withdraw from interstate commerce to enforce a scheme to avoid the consequences of interstate power flows. That different case is presented here. To hold otherwise is to conclude that FPC jurisdiction may be evaded by violation of federal law —here the Sherman Act.

Further, even assuming that jurisdiction were lawfully terminated when the TU Companies and HL&P abruptly brought about the massive disconnections here involved, it does not necessarily follow that the FPC was powerless to act on the C&SW Companies' requests which were made prior to such termination. The operative language of the Act requires only that a public utility own facilities for the transmission of power in

interstate commerce. The facilities owned by HL&P and the TU Companies are such facilities in design and capacity and in actual use on May 4, 1976, and other occasions. The discretion of the FPC to exercise its powers retroactively with respect to those periods when a company was a "public utility" has been recognized by the Supreme Court. *Connecticut Light, supra,* 324 U.S. at 535. There, the FPC, in declining to exercise these powers, gave most thorough consideration to the impact of doing so and concluded only that little public purpose would be served. *Connecticut Light & Power Co.,* 6 F.P.C. 104, 108-10 (1947). Here the case for retroactive assertion of jurisdiction would be quite different, yet the Commission gave the matter no consideration whatever.

Finally, the suggestion of the TU Companies that interstate interconnection somehow involves a "delicate balance" between national and local regulation is untenable. (Pet. at 12). Nothing in the Federal Power Act or any decision of this Court thereunder requires, or even suggests, such a conclusion. Indeed, nothing could be more clearly within the federal domain than the transmission of electric energy across state lines.[18] For these reasons the disposition by the court of appeals is at the very least an appropriate response to the confusion and intolerable results which have flowed from the Commission's Orders in this case.

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[18] It should be noted that the Public Utility Commission of Texas has attempted to embargo such transmissions. *See* Pet. at 6 n.3 and Appendix F thereto. That action of the Texas Commission—now on appeal—is unconstitutional.

4. Grant of Certiorari Would Not Settle Any Principles of General Application

Despite the exaggerated claims of Petitioners (Pet. at 16-17), a decision on the merits of the jurisdictional question will, for practical and legal reasons, be of slight legal consequence except to the parties to this case. As a matter of law, given this Court's decision in *Florida Power & Light,* as well as its earlier decision in *Jersey Central Power & Light,* few, if any, privately owned electric utilities are lawfully exempt from Commission jurisdiction. This was recognized by Justice Douglas' dissent in *Florida Power & Light* which clearly perceived and unsuccessfully urged rejection of the broad jurisdictional standard that this Court ultimately adopted. (404 U.S. at 474 n.4; *see generally* 404 U.S. at 469-76).

But as a practical matter, interconnection has been widely accepted throughout the electric utility industry as having obvious public benefits, including a reduction in the size of generating reserves, improvements in system reliability and interchanges of power between utilities so that low-cost sources can be used to greatest benefit. Because of the obvious benefits of interconnection, electric systems from the Rocky Mountains to the Atlantic Ocean are now all effectively and continuously interconnected with a single notable exception: ERCOT, *i.e.,* those systems involved here. Congressional Research Service, 94th Cong., 2d Sess., *The Electric Reliability Council of Texas Intertie Situation,* 1 (Comm. Print 1976). The states west of the Rockies are also interconnected with one another but only imperfectly with the East. Thus, a decision on the jurisdictional standards will be without practical consequence except to these parties.

Given the fact of interconnection everywhere else, the situation here is unlikely to reoccur; the Commission will not be faced with similar questions in any future cases. Thus, a ruling by this Court on the question the TU Companies propose will have no consequences for the ability of the Commission to dispose of pending cases, and such a ruling would in no way affect the Commission's continuing administration of its organic statute.

This Court has consistently indicated that the writ of certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923). *See, e.g., Rudolph* v. *United States,* 370 U.S. 269 (1962); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70 (1955); *NLRB* v. *Pittsburgh Steamship Co.,* 340 U.S. 498 (1951); *Magnum Import Co.* v. *Coty,* 262 U.S. 159 (1923). The application of that principle here requires denial of the petition for a writ of certiorari, as the questions presented by the petition are of interest and importance only to the parties litigating in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 26, 1978

APPENDIX

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

Assistant Attorney General
Antitrust Division

February 21, 1978

JHS:DLF:JDW
60-415-105
Howard K. Shapar
Executive Legal Director
Nuclear Regulatory Commission
Washington, D. C. 20555

Re: Houston Lighting & Power Company; Public Service Board of San Antonio; City of Austin; Central Power and Light Company
South Texas Project, Units 1 & 2
NRC Dkt. Nos. 50-498A & 50-499A

Dear Mr. Shapar:

This responds to your letter of August 25, 1977, which seeks our advice on the competitive implications of issuing an operating license in the above captioned matter, pursuant to the Commission's determination under section 105 (c)(2) of the Atomic Energy Act that changed circumstances in the licensee's activities make further antitrust review advisable.

A. STATUS OF THE HOUSTON LIGHTING AND POWER APPLICATION

The South Texas Project (STP), located southwest of Houston, Texas in Matagorda County, will consist of two 1,250 mw nuclear powered generating units. There are four participants in the STP, each of whom will own undivided interests as tenants in common: Houston Lighting and Power (HL&P) will own 30.8 percent and is the project

manager; the City Public Service Board of San Antonio will own 28.0 percent; Central Power and Light (CP&L) will own 25.2 percent; and the City of Austin will own 16.0 percent. The addition of the STP will increase the combined generating capacity of the participants by approximately 15 percent and thus represents an important and substantial addition to the base-load capacity of the participants.

On October 22, 1974, the Department, after conducting an antitrust review of this nuclear plant in connection with HL&P's application for a construction permit, advised the NRC that an antitrust hearing would not be necessary. A construction permit was issued for the plant and, in early 1976 the construction permit proceeding was formally closed.

At the time of our prior letter of advice most of the electric systems in Texas interconnected and coordinated with one another to their satisfaction in the Texas Interconnected System (TIS). TIS was a group of nine electric systems interconnected through high voltage transmission facilities that operated throughout most of the state of Texas. TIS was comprised of six privately-owned and three publicly-owned systems. The privately-owned systems were Dallas Power and Light Company, Texas Electric Service Company, and Texas Power and Light Company,* Houston Lighting & Power Company (HL&P), Central Power and Light Company (CP&L), and West Texas Utilities Company (WTU). The three publicly-owned electric systems were Lower Colorado River Authority, City of Austin, and City Public Service Board of San Antonio.

As of October 22, 1974, TIS was ex[c]lusively an intrastate system; none of its members was interconnected with

* Dallas Power and Light, Texas Electric Service and Texas Power and Light are the operating subsidiaries of Texas Utilities Company. When used herein, "TU" refers to Texas Utilities Company and its various operating and service subsidiary companies.

an electric utility outside Texas so as to be subject to the jurisdiction of the Federal Power Commission, and interconnection contracts among TIS members were conditioned specifically to preclude any interstate connections. In the absence of complaints from any source, the Department had expressed no view as to the legality or propriety of this "intrastate only" policy.*

In May, 1976, two principal members of TIS, CP&L and WTU, commenced to operate in interstate commerce. HL&P and TU, acting pursuant to the contractual conditions noted above, immediately opened their electrical connections with CP&L, WTU, and other Texas systems which were also interconnected with CP&L and WTU. CP&L then filed a petition at the NRC to intervene and to hold an antitrust hearing. In connection with that petition the NRC, by letter of August 3, 1976, requested the Department's advice as to whether there were compelling circumstances which warranted an antitrust review prior to the filing of an operating license application. The Department responded on January 25, 1977, and advised that, on the basis of the situation then existing

> "—with restrictions on interutility coordination resulting from the division of the utilities in the state into two groups, premised on intrastate and interstate operation respectively, with TIS eliminated as a coordinating vehicle, and with questions raised as to the viability of planned participation in the nuclear units—"

an antitrust hearing was warranted.

After transmittal of our January 25, 1977 letter, the Commission, by Memorandum and Order dated June 15, 1977, ruled that it did not have jurisdiction to order a hearing *prior* to HL&P's filing an application for an operating li-

* See condition 11 of the license conditions attached to the Comanche Peak Steam Electric Station license, AEC Docket Nos. 50-445 and 50-446.

cense. The Commission did, however, make a determination that a further antitrust review would be advisable because of the significant changes in the licensee's activities that occurred after completion of the antitrust review at the construction permit stage. That determination, and HL&P's subsequent filing of an operating license application, provided the basis for you to once more seek the Department's antitrust advice with respect to the South Texas Project.

Your letter of August 25, 1977 requires the Department for the first time to render antitrust advice under the proviso of Section 105(c)(2). That proviso states that the Attorney General's antitrust advice will not be sought at the operating license stage where a construction permit has issued, unless the Commission determines such review is "advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review . . . in connection with the construction permit for the facility."* Once the Commission has made the requisite determination then the Attorney General must conduct his review as contemplated by Section 105 (c)(1). That section provides that the Attorney General shall "render such advice to the Commission as he determines to be appropriate in regard to the finding to be made by the Commission pursuant to paragraph (5) of this subsection. Such advice shall include an explanatory statement as to the reasons or basis therefor." Thus, the Department's antitrust review at the operating license stage is no different than the review it would conduct at the construction permit stage and would not require the application of a standard different from that contemplated in Section 105(c)(5); that is whether there is a reasonable probability that the activities under the license would create or maintain a situation inconsistent with the antitrust laws.

* The licensee must have caused, or be reasonably responsible or answerable for the significant changes. Joint Committee on Atomic Energy, S. Rep. No. 91-1247, 91st Cong., 2d Sess. 29 (1970).

In addition to requesting our advice pursuant to Section 105(c)(2), you have also asked the Department to respond to certain questions raised by the Commission in its June 16, 1977, Order.

It should be noted at the outset that since the Department's advice letter of January 25, 1977, the members of TIS have reestabished their interconnections and are operating in much the same manner as they were at the time of our 1974 advice letters. The present situation is not voluntary, however, but is the result of an order of the Texas Public Utility Commission (TPUC), a state regulatory agency established in 1976 pursuant to the Public Utility Regulatory Act.* The TPUC, in May of 1977, ordered the members of TIS to reestablish the interconnections that existed prior to May 3, 1976. Since HL&P and TU were refusing to interconnect with any utility operating in interstate commerce, the TPUC ordered the utilities operating in interstate commerce to cease such operations and to reestablish interconnection with HL&P and TU. For the present, this has eliminated the severe operating problems that confronted the interstate utilities at the time of our January 25, 1977, advice letter.

B. The Competitive Situation

1. *The Department's Prior Antitrust Reviews*

Any analysis of present antitrust concerns must begin with the Department's prior antitrust review. The Department of Justice previously submitted to the Nuclear Regulatory Commission or its predecessor, the Atomic Energy Commission, antitrust advice with regard to three different construction permit applications that are relevant to the instant review. The Department first examined competitive relationships of electric utilities within Texas in connection with the application for Comanche Peak Steam Electric

* Title 32, Art. 1446(c), V.A.C.S.

Station, AEC Docket Nos. 50-445 and 50-446. In the course of that inquiry, the Department determined that various electric systems in Texas had formed the Texas Interconnected System (TIS).

As noted above, TIS was composed of nine members. HL&P was the dominant member in the southern portion of TIS and TU was the dominant member in the northern portion. Together they owned aproximately 75 percent of the generating capacity in TIS, accounted for approximately 75 percent of kwhr sales of electricity, and, more importantly, their service areas and transmission facilities were strategically located between the systems in south and central Texas with which they were interconnected and other systems that were not members of TIS to the north and east. Thus, HL&P and TU offered the only realistic opportunity for interconnection to these systems.

The members of TIS, up to that time, had not engaged in a great deal of coordinated development outside of that carried on between the integrated systems in TU. The principal reason for such relative independence was that the ready availability of inexpensive natural gas made extensive coordination unnecessary. A utility could produce a low cost reliable source of bulk power and thereby maintain its competitive position simply by installing gas-fired steam generating units. Thus, the Texas utilities enjoyed substantial independence, each installing capacity to meet its own load and reserve needs.

At that time the main function of TIS had been to provide emergency backup between the interconnected utilities and thus to increase the reliability of participants. Some cost savings were also realized. Members of TIS also conducted various studies relating to the need for, and the effects of, any future transmission and generation changes planned by the members. Thus, membership in TIS provided each member system the *opportunity* to obtain various benefits from coordination that were not available to

non-members. For example, the 1962 power interchange agreement between HL&P and TU provided for a form of staggered generation additions to obtain "certain mutual advantages in investment, efficiency and operation."

In the past, membership in TIS had not been available to all of the electric utility systems within Texas. It was the Department's view that membership in TIS was essential if the smaller electric systems were to compete effectively with the larger systems that were members of TIS. Thus, the Department sought to obtain for the smaller systems greater interconnection and coordination opportunities with the larger systems. In the Department's letter of advice concerning the Comanche Peak nuclear units, dated January 17, 1974, we advised that no hearing would be necessary if the Commission would impose certain license conditions, agreed upon by the applicant, that were designed to afford other utilities the opportunity for ownership participation in the Comanche Peak nuclear units, coordination and sharing of reserves with TU, and transmission services over TU facilities. The construction permit was subsequently issued with those license conditions attached.

The Department submitted its second advice letter on May 17, 1974, in connection with the Allens Creek Nuclear Generating Station, AEC Docket Nos. 50-466A and 50-467A. The application to construct the Allens Creek Station was filed by HL&P. In its letter, the Department noted that the restrictions on membership within TIS had recently changed and that membership was being made available to other systems. The Department also stated as follows:

> The Department has uncovered no evidence that would indicate that Applicant is attempting to prevent participation in the joint ownership of nuclear facilities by any system or is otherwise presently impairing the competitive opportunities of other systems.

The Department's advice letter in Allens Creek concluded that no antitrust hearing was necessary.

The Department rendered its third advice letter on October 22, 1974, with regard to the construction permit application for the instant South Texas Project. In that letter of advice, the Department again noted that the situation involving limitations on membership in TIS had recently changed and that membership in TIS was being made available to other systems, and concluded that no antitrust hearing was warranted.

As noted above, the members of TIS operated wholly within the state and were not interconnected with systems outside the state. Thus, TIS members were not subject to regulation by the Federal Power Commission, (nor at the time, were they subject to any state regulatory authority). In our antitrust reviews of the previous applications, the Department had encountered no claim by any electric system that the intrastate only operation of HL&P or TU was having an anticompetitive effect.

2. *Market Conditions After 1974*

In the past, utilities in Texas have used natural gas as their main and sometimes only source of fuel to generate their power needs. The fuel situation in Texas has changed drastically since our prior letters of advice. The price of natural gas in Texas has increased substantially over what it was in 1973, and the use of natural gas as a boiler fuel must be cut back by 1985 to seventy-five percent of the greater of a utility's 1974 or 1975 consumption level. This changing fuel situation has had a significant impact on the competitive posture of the various utilities in Texas. While every utility has been faced with rapid increases in its costs of power, the smaller utilities dependent on natural gas have been the hardest hit. These utilities must switch to alternatives, such as coal, lignite, and nuclear fueled generation, if they are to continue in existence, let alone be able to compete with their larger neighbors, such as HL&P and TU. The switch from natural gas to an alternative fuel will require joint participation arrangements in large base load

generating resources, since economies of scale will play a much more important role than in the past. These resources must be tied together through transmission service arrangements or the construction of new transmission facilities.

In order to maintain their competitive viability these systems must engage in a degree of coordinated operation and development that has not hertofore existed in the state of Texas. This coordination cannot be done independently of the two dominant Texas utilities, HL&P and TU, without incurring substantially increased cost, decreased reliability and an erosion of the smaller utilities competitive capabilities.

Thus, in a very real sense the changing fuel situation in the State of Texas has increased the dominance of HLP and TU by increasing the dependence of smaller systems on the generation and transmission facilities of HLP and TU.

The monopoly power of HLP and TU was clearly evidenced by the consequences of their disconnection. During the period from May, 1976, to May, 1977, two separate systems operated in Texas: HL&P, TU and the smaller utilities within their service areas constituted a wholly intrastate interconnected system which operated effectively without significant electrical problems; the other system, which included three of the four participants in the South Texas Project (the cities of Austin and San Antonio, and CP&L) and a number of other utilities, operating in interstate commerce, encountered severe operating difficulties. Without the interconnections with HL&P and TU on the eastern end of the interstate system, reliability of the system suffered, spinning reserves had to be increased and the cost of power to these systems increased. In addition, as noted in our January 25, 1977, letter, utilities that were a part of the intrastate system, such as Brazos Electric Membership Cooperative, could not participate in planned joint generation with utilities that were a part of the interstate systems,

such as South Texas Electric Cooperative and Medina Electric Cooperative. Thus, members of TIS, as well as any smaller utility in the service area of a member of TIS, were unable effectively to plan and develop large scale bulk power generation, and particularly nuclear generation, either alone or in combination with other utilities, and opportunities to coordinate reserves and to engage in purchases, sales and exchanges of bulk power were restricted.

C. The Competitive Implication of the Intrastate Only Agreement Under Current Market Conditions.*

It is in the context of changed market conditions—the increased dominance of HL&P and TU, and the effects of their having exercised such power to refuse to deal with utilities operating in interstate commerce—that the intrastate only agreement of HL&P and TU must be analyzed. The clear intent of the agreement is to prevent the parties from entering into interstate commerce. The enforcement mchanism is the underlying right of the dominant utilities to refuse to deal with any utility that breaches the agreement. In short, it is this threat of boycott which reinforces the intrastate only agreement.

The competitive consequences of this agreement are the same as those that flow from any group boycott: actual and potential competition are injured. Actual competition suffers when existing systems are disconnected from HL&P and TU, as occurred during May, 1976-May, 1977. Potential competition is foreclosed by reason of adherence to the unconditional, across-the-board ban of all interstate connections regardless of their technological and economic feasibility.

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* This section analyzes the competitive ir. 'ications of a private agreement which includes as parties the dominant utilities in the State of Texas. The significance of the TPUC order, noted *supra*, which to some extent appears to presently supercede this agreement, is discussed in Section E, *infra*.

Because the intrastate only agreement has effectively precluded *serious* attempts to establish interstate connections, sources of potential competition must be inferred from facts showing the geographic proximity of interstate utilities, and the possible need or incentive to establish connections with such systems.

In the areas in which HL&P and TU face competition or could reasonably compete, there are a number of privately-owned and publicly-owned systems that generate and market electric power, and a number of distribution-only systems purchasing power at wholesale from one or more generation and transmission systems marketing firm bulk power. Some of these generating entities operate in interstate commerce, such as Southwestern Electric Power Co. (SWEPCO), Gulf States Utilities (GSU), Western Farmers Cooperative (in Oklahoma), and Southwestern Power Administration (an agency of the U.S. Government). These interstate system are sources of potential competition for the patronage of the approximately 150 distribution systems in Texas that purchase power at wholesale.

In addition to the potential for increased competition at the wholesale level, there appear to exist substantial opportunities for exchanges of power between the interstate and intrastate utilities.

Utilities in the South West Power Pool are faced with declining reserve margins and will need to purchase generating capacity to maintain adequate reliability until additional generation can be constructed. For example, Western Farmers Cooperative sought to purchase 300 to 400 mw of surplus generating capacity from TU but was unable to do so because of the intrastate only restriction. A number of the utilities in Texas, including competitors of HL&P and TU, have a surplus of generating capacity. The intrastate only policy of HL&P and TU would prevent any utilities with which they are interconnected from marketing any surplus capacity to the interstate utilities. For example, the

City of Bryan, Texas has recently installed a new generating unit bringing its total generating capacity to approximately 225 mw. On the other hand, because of its higher power cost the City is losing College Station as a wholesale customer. College Station represents approximately 27 percent of Bryan's electric load. The city's remaining customers will have to absorb the cost of this excess capacity if it is not sold, thus further eroding Bryan's ability to compete. Although Gulf States Utilities will have high voltage transmission lines in the area and may constitute a ready market for the capacity, the City would not be able to sell its surplus capacity to Gulf States without violating the intrastate only restriction and risking disconnection from the other members of TIS.

The intrastate only restrictions could also prevent municipal and cooperative systems in Texas from being able to receive an increased share of low cost Southwestern Power Administration (SPA) power should additional amounts of capacity become available. The SPA may also constitute a market for the surplus capacity noted above since, when it is faced with low water levels on its system, it must purchase deficiency power in order to meet its contractual obligations to its preference customers.

Thus the intrastate only restriction, by preventing utilities within the Texas intrastate system from engaging in power exchange transactions with utilities outside the intrastate system, could foreclose acess to a substantial part of the market for power exchange services.

Given current market conditions the intrastate only agreement may serve to unreasonably foreclose a significant degree of potential competition. The nature and extent of such foreclosure can only be established after a full evidentiary proceeding.

So long as HL&P intends that the operation of the jointly-owned South Texas Project be in accordance with the terms of the intrastate restrictions imposed by HL&P

and the TU system, HL&P's activities under the nuclear license in furtherance of that restriction can maintain and enhance a situation inconsistent with the antitrust laws contrary to section 105 of the Atomic Energy Act.

D. Additional Points Raised in Your Letter Requesting Advice

In your letter of August 25, 1977, you requested that the Department provide "an evaluation of the legal significance of the various facts and contentions dealt with in the Attorney General's letter of January 25, 1977."

At the time of the Department's letter of January 25, 1977, HL&P and TU, the two dominant utilities in Texas, were refusing to interconnect with other utilities (utilities with which they had historically maintained interconnections); that refusal was having a direct and substantial adverse effect on those utilities' power supply costs, reliability and their ability to remain competitive.

HL&P's refusal to deal with any interstate system went beyond a mere unilateral announcement of its decision to that effect. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149-150 (1968). Its action was part of a course of conduct whereby HL&P had joined with the other dominant system within Texas to use their combined power to require other electric utility systems to act in accordance with their direction. The concerted action by HL&P and TU deprived competitors of a valuable business service needed in order to compete effectively and thus raised serious antitrust issues which the Department viewed as warranting a hearing. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1969); *Associated Press* v. *United States*, 362 U.S. 1 (1945); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 612 (1914).

Your letter of August 25, 1977 also asks that the Department "advise as to why enforcement of a contract right,

known to all parties and the Assistant Attorney General at the time of the construction permit antitrust review, may constitute 'changed circumstances' such as may justify the imposition of antitrust conditions."

While the Department was aware of the existence of the interstate only restrictions at the time of its prior advice, the Department was not aware of any anticompetitive effect or anticompetitive injury resulting from those restrictions. Nevertheless, the Department did recognize that possible antitrust consequences might flow from such restrictions and included in condition 11 of the Comanche Peak construction permit a statement that continuance of the policy [of intrastate only operation] was not to be interpreted to reflect any view as to the "legality or propriety of said policy."

Iin evaluating the competitive significance of any course of conduct, careful attention must be given to the commercial context within which that conduct occurs. Changed circumstances necessarily imply that, where a provision may be seen to have had a neutral impact in one set of circumstances, a change in those circumstances later on may reveal the anticompetitive nature of the same provision. The changed circumstances described above show very significant anticompetitive effects have arisen since the Department's original advice letter. While HL&P did not cause, or cannot be held answerable for the increased costs of fuel to its competitors, HL&P is the cause and is answerable for the adverse effects of disconnecting from the smaller competitors that were operating in interstate commerce. Moreover, the basis for such action derived from the intrastate only agreement. Thus, on the basis of events occurring after the Department's original advice letter it can now be clearly seen that, with the increased importance of economic coordination brought about by the fuel situation, and the corresponding increased need and opportunity for coordination between interstate and intrastate utilities, HL&P, together with TU, by agreeing not to interconnect

with utilities operating in interstate commerce have the power to and may adversely affect the future competitive situation, in or contiguous to the state of Texas, both between the intrastate systems and between the interstate and intrastate systems.

Certainly, as a matter of law, the Commission is not foreclosed from considering at this time the intrastate only restrictions. The mere fact that the Commission may conclude at any particular point in time that antitrust enforcement action is not advisable does not foreclose it from subsequently acting to confront a situation it then finds to be inconsistent with the antitrust laws if it otherwise has jurisdiction to act. *U.S.* v. *New Orleans Chapter, Associated General Contractors of America, Inc.*, 382 U.S. 17 (1965). Not even trade arrangements which have been long tolerated thereby require any vested immunity under the Sherman Act. *Times-Picayune Publishing Co.* v. *U.S.*, 345 U.S. 594 (1953). Even contemplated actions, such as mergers, once examined and not contested, can later be challenged if the dictates of the public interset (sic) so require. *U.S.* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966) *Aff'd*, 385 U.S. 37 (1966).

In the Department's letter of January 17, 1974, pertaining to the Comanche Peak Generating Station, it was expressly indicated (in condition #11 of that license) that no view was then being taken as to the legality of the policy foreclosng (sic) transmission of power in interstate commerce. As the court noted in *U.S.* v. *Grinnell Corp.*, 30 F.R.D. 358 (D. R.I. 1962), whenever the Government reserves its future right to take action, any such communication of policy is not a final disposition of the matter at issue. Put succinctly, the obligation to protect the public interest can never be estopped by inaction at an earlier point.

E. The Proceedings in Other Forums

Your letter of August 25 finally asks that the Department provide "an evaluation of the probable effects of proceed-

ings in other forums, as they have then progressed, in developing his [our] recommendations concerning further antitrust hearings." There are four proceedings in other forums, *i.e.,* the Securities and Exchange Commission (SEC), the Federal Power Commission (FPC), the U.S. District Court in Dallas, Texas, and the Texas Public Utility Commission (TPUC), whose impact must be analyzed.

The proceeding before the SEC commenced in 1974 after several Oklahoma cooperatives and municipalities complained that the operating subsidiaries of Central and South West Corporation (C&SW), which include CP&L and WTU, were not operationally integrated and, therefore, were in violation of the Public Utility Holding Company Act of 1935. The SEC instituted hearings which, under the statute, involve as the sole issue:

> Whether the electric utilities facilities of subsidiaries of Central and South West Corporation supplemented as planned or proposed are capable of being economically operated as a single integrated and coordinated system and whether the proposals presented by Central and South West Corporation and its subsidiaries, with any amendments or modifications which may be developed during the proceeding, represent a reasonable prospect of achieving such economical operation, and what contingencies, if any, may affect carrying out any of such proposals.

Although HL&P and TU are participating in the hearings, it is clear that the SEC has no statutory authority to require that HL&P implement any interconnection plan with CP&L or any other utility; and that it cannot affect the competitive situation in Texas. Moreover, the SEC could not interfere with the NRC's power to remedy anticompetitive situations. Thus, it is our view that the SEC proceeding has no bearing on the question of whether an antitrust hearing before the NRC is necessary.

A proceeding before the FPC (now FERC) was initiated when CP&L filed a petition in May 1976, requesting the FPC to find that CP&L, WTU, TU and HL&P were operating in interstate commerce and thus were all under the jurisdiction of the FPC. This contention was grounded on the fact that these systems had been interconnected for approximately eight hours, during which time WTU transmitted power across the Texas border into Oklahoma. The FPC issued an order, finding that, *inter alia*, CP&L and WTU were jurisdictional but that TU and HL&P were not.* This decision is on appeal to the U.S. Court of Appeals, D. C. Circuit. Should the Court of Appeals reverse and hold that HL&P and TU are subject to the jurisdiction of the FERC then, as a practical matter, the intrastate only policy of these parties will have been ended. On the other hand, a more likely course for the Court, if it does not affirm, would be to remand to FERC for an evidentiary hearing. Neither affirmance nor remand would relieve the NRC of its statutory duty to remedy an anticompetitive situation nor preclude the Commission from doing so. The Department views the outcome of the FERC proceeding as too speculative to warrant much weight in our recommendation.

The third proceeding involves a civil complaint which has been filed by CP&L in the U.S. District Court in Dallas, Texas. CP&L alleges that HL&P and TU, by refusing to deal with utilities in interstate commerce, have engaged in a conspiracy in violation of Section 1 of the Sherman Act and an attempt to monopolize in violation of Section 2 of the Sherman Act. The legality of the intrastate only agreement is squarely before the district court. It is conceivable, therefore, that the court could find such agreement unlawful and enter a permanent injunction against it. In that

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* The FPC, in a later order denying a petition for reconsideration, specifically declined to consider antitrust issues that CP&L sought to raise.

event, NRC action might become unnecessary. On the other hand the proceeding involves two groups of large investor-owned systems each seeking to protect its own private corporate interests. They might settle their differences without resolving any of the antitrust concerns raised by the Department. Moreover, even if the defendants prevail in the district court the question of the legality of intrastate only agreements would not be settled since both the parties and legal standards are different in that case than they would be before the NRC.

While this is the only proceeding which may consider some of the same issues as would be raised before the NRC, we cannot be certain that a decision of the District Court will be dispositive. The Department believes it would be unwise and inappropriate for the NRC to defer to the district court proceeding. It must be remembered that this—the operating license stage—is the last opportunity that the NRC has to carry out its statutory mandate to use its licensing authority to prevent the creation or maintenance of a situation inconsistent with the antitrust laws. If the Commission fails to act now it runs the risk of facing an unremediable anticompetitive situation in the future.

A fourth proceeding arose before the TPUC. Until the TPUC was formed in 1976, electric utilities in Texas were not subject to any statewide regulatory agency and, outside of retail rate regulation by the governing body of the municipalities within which it operated, an electric utility was essentially unregulated.

In January of 1977, HL&P and other utilities in the TIS area petitioned the TPUC, to require WTU and CP&L to cease interstate operation and to reconnect with the interstate utilities. The TPUC, on May 2, 1977, without any hearings and contrary to its findings of the year before,*

* After a one day hearing in May of 1976, the TPUC made a finding that the situation, with HL&P and TU disconnected from

found that the then existing situation, with WTU, CP&L and the three public systems operating disconnected from TU and HL&P. was having an adverse impact on the power supply situation in Texas, both in terms of reliability and cost of power. An order was issued requiring WTU to cease transmission of power into the state of Oklahoma and for WTU and CP&L to reestablish interconnection with TU and HL&P. The TPUC thereafter held hearings and, by an amended final order dated July 11, 1977, confirmed its earlier order of May 2, 1977.

The final amended order prohibits all TIS members from disconnecting without TPUC authorization and further restrains any utility system connected with TIS from making connections with utility systems not so connected, unless authorized by Texas law or so ordered by the FPC or the TPUC. The order also provides that TPUC decisions on applications seeking relief from these prohibitions are to be governed by a public interest standard.

CP&L has appealed the TPUC order to the Federal District Court in the Western District of Texas and to a state court. It has not yet been decided which court will ultimately act on the appeal.

At the present time, it is clear that to some extent the TPUC order has superceded, but not validated, the intrastate only agreement of the private utilities. The agreement is superseded in the sense that it is no longer the sheer economic power of the parties but rather the force of state law that restrains members of TIS from entering into interstate commerce. The agreement is not validated, however, since the TPUC expressly disclaimed any jurisdiction to determine whether the subject contracts were

the other TIS members, was not adversely affecting the reliability of any of the utilities. No determination was made as to any economic or competitive effects on any of the utilities.

void or voidable. Therefore, while presently supplanted by a TPUC order, the private intrastate only agreements remain in existence and are capable of future implementation.

There are two reasons why the NRC ought to order an antitrust hearing in spite of the TPUC order. First, the Commission is confronted with a private agreement that raises serious competitive issues, that has not been abandoned by the parties and that has yet to be enjoined or declared unlawful. There is a real question as to whether the TPUC restraint on interstate connections is valid under the Commerce Clause of the United States Constitution. (Art. 1, Section 8, Clause 3)* If on review, a court should abrogate that portion of the TPUC order, the TPUC might lift its injunction against disconnections from TIS. The point is simply that the private agreement may again become fully operative.

Given that the NRC has a non-delegable statutory responsibility to use its licensing authority to prevent the creation or maintenance of a situation inconsistent with the antitrust laws, it cannot ignore or look to others to prevent or correct an anticompetitive situation. Moreover, under its June 11, 1977, Order in which it held itself to have only limited continuing antitrust authority the Commission will have no *later* opportunity to exercise its power since its jurisdiction to act is confined to the licensing stages.

Second, the TPUC may enforce its order in a manner which basically vindicates the operation of the intrastate only agreement. Arbitrary denials of applications for interstate connections can have the same anticompetitive ef-

* See *Penn.* v. *West Virginia* 262 U.S. 533 (1923); *FPC* v. *Corporation Commission of the State of Oklahoma,* 362 F. Supp. 522 (W.D. Okla. 1973) (Three Judge Court), *Sum, aff'd,* 415 U.S. 961 (1974).

fects as those that result from the threat of boycott. While we do not assert that the TPUC will act arbitrarily we also do not believe that the NRC can ignore its responsibility to protect interstate commerce from unreasonable competitive restraints—even those imposed by a state agency. The NRC can prevent the TPUC from improperly restricting competition by exercising its authority to condemn the intrastate only agreement and by reserving in license conditions the right to review and to countermand unreasonable refusals or failures to interconnect with utilities operating, or desiring to operate in interstate commerce, even where such actions are the result of TPUC decisions. This would not place the NRC in conflict with the TPUC since the Texas Public Utility Regulatory Act expressly provides that "No rule or order of the regulatory authority shall be in conflict with the rulings of any federal regulatory body."*

F. Conclusion

In view of the above legal and factual analysis, and the inability of the Department to conclude that the same issues raised herein will necessarily be resolved satisfactorily in another forum, the Department renews its advice that an antitrust hearing be held on the applicant's operating license. The purpose of the hearing would be to determine whether in order to remedy a situation inconsistent with the antitrust laws HL&P should be precluded from adhering to the intrastate only agreement or from unreasonably refusing to engage in interstate connections. At the time of the hearing, the Department of Justice may wish to participate to elaborate upon its views expressed in this letter,

* Public Utility Regulatory Act, Tit. 32, Art. 1446(c), § 37 V.A.C.S.

to offer evidence, to connect up legal theories and to evaluate and respond to submissions made by the parties.

Sincerely yours,

/s/ JOHN H. SHENEFIELD
John H. Shenefield
Assistant Attorney General

Supreme Court, U. S.
FILED
OCT 18 1978
EDAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-318

DALLAS POWER & LIGHT COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY,

Petitioners,

v.

CENTRAL POWER & LIGHT COMPANY, PUBLIC SERVICE COMPANY OF OKLAHOMA, SOUTHWESTERN ELECTRIC POWER COMPANY, WEST TEXAS UTILITIES COMPANY, CITY OF ALTUS, OKLAHOMA, CITY OF FREDERICK, OKLAHOMA, CITY OF CORDELL, OKLAHOMA, CITY OF MANNFORD, OKLAHOMA, VERDIGREE VALLEY ELECTRIC COOPERATIVE, INC., INDIAN ELECTRIC COOPERATIVE, INC., MUNICIPAL ELECTRIC SYSTEMS OF OKLAHOMA, ARKANSAS ELECTRIC COOPERATIVE CORPORATION, FEDERAL ENERGY REGULATORY COMMISSION, HOUSTON LIGHTING & POWER COMPANY, CITY OF SAN ANTONIO, LOWER COLORADO RIVER AUTHORITY,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Reply Brief of Dallas Power & Light Company, Texas Electric Service Company, and Texas Power & Light Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-318

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Petitioners,

v.

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INTRODUCTION

Petitioners Dallas Power & Light Company (DP&L), Texas Electric Service Company (TESCO), and Texas Power & Light Company (TPL), the operating subsidiaries of Texas Utilities Company (TU), are submitting

this Reply Brief in response to certain arguments advanced by Respondents Central Power & Light Company (CP&L), Public Service Company of Oklahoma (PSO), Southwestern Electric Power Company (SWEPCO), and West Texas Utilities (WTU), the operating subsidiaries of Central and South West Corporation (CSW), in their Brief Opposing Certiorari, filed with the Court on September 26, 1978.

ARGUMENT

This Court's decision in *Connecticut Light & Power Company* v. *FPC* precludes any determination that the TU companies are subject to the jurisdiction of the Federal Energy Regulatory Commission under the Federal Power Act.

As explained in the Petition for a Writ of Certiorari (pp. 14-15), the TU companies were suseptible to a claim of jurisdiction under the Federal Power Act only during a ten-hour period on May 4, 1976, during which time they were involuntarily interconnected with electrical systems which directly or indirectly transmitted or sold electric energy in interstate commerce. All interconnections of the TU companies with WTU and others engaged in the sale or transmission of electric energy in interstate commerce were opened by 3:43 p.m., May 4, 1976, at which time the operations of the TU companies were once again confined solely to Texas. Moreover, the undisputed evidence clearly establishes that at all times after 3:43 p.m., May 4, 1976, the TU companies have operated electrically isolated from all systems susceptible to the jurisdiction of the Federal Energy Regulatory Commission under the Act. In view of these facts, this Court's decision in *Connecticut Light & Power Company* v. *FPC*, 324 U.S. 515 (1945),

requires a determination that the TU companies are not subject to the jurisdiction of the Commission.

In *Connecticut*, the Court recognized that the test of jurisdiction must be measured from facts which exist at the time the agency asserts jurisdiction. 324 U.S. at 531. Because the operations of the TU companies are now and since May 4, 1976 have been confined to Texas, the TU companies are not susceptible to classification as public utilities under the Federal Power Act, subject to the jurisdiction of the Federal Energy Regulatory Commission.

The CSW companies' response (Brief Opposing Certiorari, pp. 18-19) to this argument is perfunctory at best, consisting only of assertions, unsupported by reference to facts of law, that Petitioners' argument is frivolous and irrelevant. Significantly, the CSW companies do not challenge the validity of Petitioners' analysis of the *Connecticut* decision. Instead, they assert that *Connecticut* is inapplicable to the instant case because it concerns the withdrawal from interstate commerce of a single company only. The CSW companies allege that the TU companies have removed themselves from interstate commerce through the concerted implementation of a long-standing conspiracy violative of the antitrust laws. (Brief Opposing Certiorari, p. 18) This position is at odds both with decisions by this Court and with the facts of the case. The TU companies could in no event be subject to jurisdiction under Part II of the Federal Power Act once any interstate flow of electric energy ceased. Consequently, consideration of alleged anticompetitive practices is totally irrelevant to the Commission's and the Court of Appeals' decisional process, there being no requisite jurisdictional facts.

Consideration of anticompetitive matters is within the regulatory mandate of the Commission only when the

company involved already is a "public utility" under the Act and there is a nexus between the alleged anticompetitive practices of the public utility and the regulatory jurisdiction of the Commission. *City of Lafayette, Louisiana* v. *SEC*, 134 U.S. App. D.C. 229, 454 F.2d 941, 955 (1971), *aff'd sub nom., Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 (1973).

In *City of Lafayette*, certain cities had petitioned for review of orders of the Federal Power Commission (FPC), Securities and Exchange Commission (SEC) approving applications by two electric utilities (Gulf States Utilities Company before the FPC and Louisiana Power & Light Company, before the SEC) proposing issuance of bonds, notes and stock, on the grounds that the agencies failed to take proper account of the cities' claims that the proceeds would be used to advance an unlawful conspiracy by the two utilities to suppress competition. The United States Court of Appeals for the District of Columbia Circuit affirmed the SEC order because the SEC had no regulatory jurisdiction over the operations of Louisiana Power & Light Company. 454 F.2d at 955. Since the FPC had regulatory jurisdiction over Gulf States Utilities Company, because of its undisputed status as a "public utility" under the Federal Power Act, the Court of Appeals ordered the FPC to conduct further proceedings with respect to the anticompetitive allegations. 454 F.2d at 949.

The decision of the Court of Appeals was affirmed by this Court in *Gulf States Utilities Company* v. *FPC*, 411 U.S. 747 (1973). This Court accepted the reasoning of the Court of Appeals that the agency must have specific regulatory authority over a utility before it could inquire into anticompetitive allegations:

> . . . [T]he general doctrine requiring any agency to take account of antitrust considerations does not extend to a case like the one before us where the antitrust problem arises out of operations of the regulated company (past and projected) and the agency, here the SEC, has not been given any regulatory jurisdiction over operations of the company. The SEC has no jurisdiction over operations and stands in a different posture from the FPC which, as we have already noted, has regulatory jurisdiction over operations in view of its authority, *inter alia*, to direct utilities to interconnect on reasonable terms, or to prohibit a utility from discriminating in rates and facilities against its municipal customers. 411 U.S. at 754.

In sustaining the lower court's holding, this Court found that the regulatory power of the FPC over the operations of the interstate public utility business carried with it a responsibility to consider the anticompetitive effects of regulated aspects of interstate utility operations. The Commission's responsibilities in this regard, however, were carefully tied by the Court to directives contained in specific sections of the Federal Power Act. 411 U.S. at 758-759. Unless the Commission first possesses regulatory authority over utility operations, then it has no authority to consider allegations of anticompetitive conduct.

Having confined their operations to the State of Texas, the TU companies are not susceptible to the regulatory jurisdiction of the FERC. Consequently, the Commission had no duty, indeed had no authority, to consider anticompetitive contentions. The Commission correctly rejected the attempt by the CSW companies to "bootstrap" the jurisdictional status of the TU companies on the basis of anticompetitive allegations.

The actions taken by the TU companies to limit their system to intrastate operations are consistent with the regulatory scheme authorized by Congress in the Federal

Power Act. The Act specifically recognizes the existence and authority of state regulatory commissions and the limitations of federal authority:

> . . . such Federal regulation, however, to extend only to matters which are not subject to regulation by the States. (49 Stat. 847, 16 U.S.C. §824(a))

Moreover, unlike the Natural Gas Act which in Section 7(b) prohibits the abandonment of any service without approval of the Commission, the Federal Power Act is silent on this subject.

The right of an electric utility to structure its operations to remove itself from the ambit of the Commission's jurisdiction was specifically recognized by this Court in *Connecticut Light & Power*. 324 U.S. at 517-519. This right is not contested by the CSW companies. Rather, they fill their Brief Opposing Certiorari with unspecific and unproven claims of anticompetitive activity, illegal disconnections and actions against the public interest by the TU companies. These allegations are irrelevant to the narrow jurisdictional issue before the Court. Such charges of violations of the antitrust laws are merely an attempt to circumvent the plain meaning of *Connecticut* so as to induce the Commission into asserting jurisdiction over the TU companies and thus to preserve the corporate structure of CSW. The Commission properly refused this gambit, and this Court should direct the Court of Appeals to sustain the Commission's decision.

In its opinion, the Court of Appeals failed to reach the merits of the jurisdictional question before it and instead chose to remand that question to the Commission. The decision by the Court of Appeals contravenes the recent holding of this Court in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 98 S.Ct.

1197 (1978). In the *Vermont Yankee* case, this Court criticized the remand of orders of the Atomic Energy Commission by the Court of Appeals for the District of Columbia Circuit as an intrusion by the court into the administrative process. 98 S.Ct. at 1218. Administrative decisions, the Court held, should be set aside only for substantial procedural or substantive reasons as mandated by statute. 98 S.Ct. at 1219. Yet, in the instant case, the Court of Appeals would require the Commission to conduct hearings or otherwise augment the record of a proceeding which can have but one result: a finding that the TU companies are not susceptible to jurisdiction under the Federal Power Act. The dictating of such useless administrative procedures by the Court of Appeals is precisely the matter which this Court addressed, and rejected, in *Vermont Yankee*. The interest in dispensing with such unnecessary but costly proceedings is not confined to the TU companies but is an interest of national importance as this Court indicated in *Vermont Yankee*. Here, too, the Court should reverse the decision to remand by the Court of Appeals, and should direct it to uphold the Commission's determination of the jurisdictional issue.

CONCLUSION

For these reasons and for those presented in the Petition for Certiorari, Dallas Power & Light Company, Texas Electric Service Company and Texas Power & Light Company pray that this Court grant the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, that this Court reverse the decision of the Court of Appeals and that this Court direct the Court of Appeals to sustain the Commission's determination that it is without jurisdiction over the TU companies as a matter of law.

Respectfully submitted,

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I hereby certify that I have on this 18th day of October, 1978, served a copy of this Reply Brief, herein by mailing three copies thereof, together with a copy of this Certificate, postage prepaid, to counsel for all parties of record as follows:

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v.

CENTRAL POWER & LIGHT COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

Petitioners, electric utility companies that are subsidiaries of the Texas Utilities Company, contend that the court of appeals erred in remanding for clarification an order of the Federal Power Commission holding that it lacked jurisdiction over petitioners.

1. Prior to May 4, 1976, petitioners and other electric utilities, including Central Power & Light Company (CP&L) and the Southern Division of West Texas Utilities Company (WTU), formed an inter-

connected power pool operating only within the State of Texas, called the Electric Reliability Council of Texas (ERCOT) (Pet. App. A-3, C-15). Under the agreement forming ERCOT and other individual agreements between ERCOT-member utilities, those utilities covenanted not to operate in interstate commerce or to interconnect with utilities that did (Pet. App. A-3, C-5). Nevertheless, on May 4, 1976, WTU's Southern Division began transmitting electric energy in interstate commerce to the Public Service Company of Oklahoma (PSO), a WTU affiliate operating in Oklahoma (Pet. App. A-3, C-5, C-14 to C-15). (WTU, PSO, and CP&L are all operating subsidiaries of the Central and South West Corporation (CSW).) This action temporarily placed all electric utilities interconnected with WTU, including petitioners, in interstate commerce. Later on May 4, 1976, after 10 hours of the interstate transmission, petitioners and the Houston Lighting and Power Company (HL&P), another member of ERCOT, disconnected themselves from WTU and its affiliates (Pet. App. C-3; C-15 to C-16). The result was to bifurcate ERCOT's operations into interstate and intrastate divisions.

Meanwhile, also on May 4, 1976, WTU's parent company, CSW, petitioned the Federal Power Commission to "[c]onduct such investigations and issue such orders as are necessary and proper" under Section 202(a) and (b) of the Federal Power Act, 16 U.S.C. 824a(a) and (b), to maintain the interstate connection between CSW and ERCOT and to promote and encourage the interconnection of ERCOT

with the Southwest Power Pool, an interstate power pool of which PSO is a member (Pet. App. C-2). On May 13, 1976, CSW further petitioned the Federal Power Commission for an order requiring the emergency reconnection of ERCOT and CSW pursuant to Section 202(c) of the Act, 16 U.S.C. 824a(c) (Pet. App. C-3).

On July 21, 1976, the FPC issued its "Order Rejecting in Part and Accepting in Part Application for Action Pursuant to Section 202" (Pet. App. C-1 to C-25). The Commission held that, by virtue of the events of May 4, 1976, WTU and CP&L were "public utilities" subject to the Commission's jurisdiction under Section 201(e) of the Act, 16 U.S.C. 824(e). However, relying on a memorandum by its General Counsel (Pet. App. C-15 to C-17), the Commission held that petitioners and HL&P had not become "public utilities," despite the temporary interstate connection, and that it therefore lacked jurisdiction to grant the relief requested by CSW under Section 202(b) (Pet. App. C-8, C-12). The Commission also refused to order an emergency interconnection of ERCOT and CSW pursuant to Section 202(c) of the Act (Pet. App. C-8). The Commission did, however, order further investigation under Section 202(a) and a temporary interconnection between ERCOT and CSW affiliates under the emergency provisions of Section 202(d), 16 U.S.C. 824a(d), which it held would not make petitioners "public utilities" subject to the Commission's jurisdiction (Pet. App. C-8 to C-12).

On review, the court of appeals remanded the case for clarification of the Commission's rationale. The court held that neither the Commission's order nor the General Counsel's memorandum on which it relied adequately explicated the basis of the decision. Specifically, the court was unable to discern whether the FPC's determination that petitioners were not subject to its jurisdiction rested on a conclusion of law or an exercise of discretion (Pet. App. A-3 to A-5). The court further noted that if jurisdiction had been declined as a matter of discretion on the basis that the interstate transmission constituted a breach of the ERCOT contracts, the FPC had failed to consider arguments that the contracts violated the antitrust laws (Pet. App. A-3 to A-4).

2. Petitioners assert that the court of appeals should have decided the jurisdictional question of whether they are "public utilities" under the Federal Power Act. However, the Commission agrees with the court of appeals that it should reexamine this case. The court of appeals did not, as petitioners claim, delegate to the Commission the court's ultimate responsibility to adjudicate the question of the agency's jurisdiction. The court sought a clarification of the FPC's rationale in declining jurisdiction so that it could properly review the agency's initial determination of the issue. See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647-648 (1972). Indeed, while petitioners now assert (Pet. 10-11) that the FPC order found no jurisdiction as a matter of law,

petitioners' brief in the court of appeals,[1] as well as the cases cited in the General Counsel's memorandum,[2] suggest that the FPC exercised its discretion in concluding that petitioners were not "public utilities." In the absence of a discernible administrative rationale based on an adequate record, the court of appeals appropriately remanded for clarification. See, *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196-197 (1947). This is not a case like *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), where a court of appeals unduly interfered with agency procedures and with decisions made following extensive administrative hearings.

Moreover, in view of the Commission's acquiescence in the remand, review by this Court at this time appears unwarranted. After the Commission has considered the factors bearing on the jurisdictional issue and has made its position clear, aggrieved parties will be able to obtain effective judicial review.

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[1] Brief for Intervenors at 14-15, 28, *Central Power & Light Co.* v. *Federal Energy Regulatory Commission*, 575 F.2d 937 (D.C. Cir. 1978).

[2] *E.g.*, *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 536 (1945) ("Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations"), cited at Pet. App. C-17.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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REPLY BRIEF OF DALLAS POWER & LIGHT COMPANY, TEXAS ELECTRIC SERVICE COMPANY, AND TEXAS POWER & LIGHT COMPANY TO THE MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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Petitioners Dallas Power & Light Company (DP&L), Texas Electric Service Company (TESCO), and Texas Power & Light Company (TPL), the operating subsidiaries of Texas Utilities Company (TU), are submitting this Reply Brief in response to certain arguments advanced by the Solicitor General on behalf of the Federal Energy Regulatory Commission (FERC or Commission) in his Memorandum in Opposition filed with this Court on October 26, 1978.[1]

[1] Petitioners responded separately to arguments advanced by the operating subsidiaries of Central and South West Corporation in a Reply Brief filed on October 18, 1978, since the Solicitor General was given an extension of time to file a Brief in Opposition.

In their Petition for a Writ of Certiorari the TU companies seek a determination that the Commission lacked authority to invoke jurisdiction under the Federal Power Act (the Act) over them since, at the time of the Commission's decision and at all subsequent times, they neither owned nor operated any facilities outside a single state and they neither, directly or indirectly, transmitted nor sold, at wholesale or retail, any electric energy in interstate commerce. In its Memorandum in Opposition, the Commission asserts that re-examination of the case by the Commission is appropriate, prior to any further consideration by judicial authority. This argument ignores the proper application of the jurisdictional standards of the Act and the concomitant public interest in a speedy resolution of this issue.

The FERC correctly states Petitioners' assertion that the Court of Appeals should have decided whether the Act delegates to the Commission any power to exercise jurisdiction over Petitioners, *i.e.* whether the TU companies are public utilities within the meaning of the Act. However, Petitioners have never claimed that the Court of Appeals delegated its ultimate responsibility to adjudicate the question of the agency's jurisdiction to the Commission.[2] Rather the Petitioners asserted that it needlessly avoided this basic issue when it had every reason to exercise the judicial function committed to it.[3]

The FERC further argues that the Court of Appeals sought a clarification of the Commission's rationale in

[2] Memorandum for the FERC in Opposition, at 4 (hereinafter cited as FERC Memo).

[3] Petition, at 9.

declining jurisdiction so that it could *properly* review the agency's initial determination of the issue (emphasis added).[4] Apparently, the FERC believes that the Court could not properly review its initial determination absent Commission clarification. Petitioners assert that further clarification by the Commission is not necessary for a proper exercise of judicial review.

All relevant facts necessary to a judicial decision on the jurisdictional issue as a matter of law are uncontroverted in the record, so remand of this proceeding for clarification of the Commission's reasoning is an unnecessary and dilatory act. Remand to the FERC will simply delay the judicial determination which this Court has mandated: ". . . [A]n agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369 (1946). As a judicial function, it is a question of law wherein a clear statement of the agency's position is valuable but not necessary to the resolution of the case.

In *Conway Corp.* v. *FPC,*[5] a case involving allegations of price squeeze, the Court of Appeals for the District of Columbia Circuit considered whether an order of the Commission was sufficiently final for judicial review. The Commission contended that the order denying intervention on the price squeeze issue was not of the "definitive character" required by Section 313 (b) of the Federal Power Act for proper judicial review. The court held that where petitioners raise a question of law which will not be better defined by further development of the record, the order is suffi-

[4] FERC Memo, at 4.

[5] 510 F.2d 1264, 1267 (1975), *aff'd* 426 U.S. 271 (1976).

ciently final and ripe for judicial review, which it rendered in that case. Since the determination of the scope of Commission jurisdiction is a judicial function, *i.e.* a question of law, the Court of Appeals could quite properly have rendered a judgment on the proper interpretation of the statute. Thus a clear explanation of the Commission's position is not necessary to the exercise of the judicial function by the Court of Appeals.

As stated in the Petition, the remand merely postpones for a later day the final resolution of an important issue of the scope of federal administrative power over the delivery of electric energy, a matter of major national concern.[6] This proceeding has continued for more than two years already, and any further consideration of the issue by the Commission will only needlessly delay the ultimate determination of the scope of Commission jurisdiction in the courts.

The erroneous reasoning of the Commission is demonstrated by its reliance on *FPC* v. *Louisiana Power & Light Co.*[7] The Commission incorrectly cites *Louisiana Power & Light Co.* for the proposition that the Court of Appeals was justified in seeking a clarification of the Commission's rationale in declining jurisdiction in order to review properly the agency's initial determination of the issue. That case dealt with the issue of primary jurisdiction, not ripeness for review. In that case, this Court held that the Court of Appeals erred in deciding the question of jurisdiction:

> The FPC had exercised its primary jurisdiction and was conducting proceedings to determine whether the [pipeline in question] was subject to its jurisdiction. In that circumstance, the District Court and the Court of Appeals were obliged to defer to the FPC for the initial determination of its jurisdiction. [Citations omitted] The need to protect the primary authority of an agency to determine its own jurisdiction "is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the [agency]. While the [agency's] decision is not the last word, it must assuredly be the first." 406 U.S. at 647, *quoting Marine Engineers Beneficial Assn.* v. *Interlake S.S. Co.*, 370 U.S. 173, 185 (1962).

[6] Petition, at 12.

[7] 406 U.S. 621 (1972).

Instead of deferring to the Commission for an initial determination, the Court of Appeals rendered its own decision denying jurisdiction one month before the Commission concluded it had jurisdiction.[8] This Court concluded that a judicial determination should be based upon review of a Commission decision, as opposed to an original action in the courts. This Court saw no need to make the same disposition of the other issue in that case, the Commission's jurisdiction to order a curtailment plan, since the Court of Appeals had the Commission's final opinion and order before it and acted upon the opinion in reaching its decision.[9]

In the present case, the Commission had full opportunity to speak the first word concerning its jurisdiction, and the Court of Appeals had the Commission's final order before it in the normal course of review. Thus, far from supporting the Commission's proposition, *FPC* v. *Louisiana Power & Light Co.* better sup-

[8] *Id.* at 630n. 10.

[9] Argument was heard in the 5th Circuit one month after the FPC issued Opinion No. 606. *Id.* at 630n. 10.

ports Petitioners' request for a resolution of the legal issue concerning the agency's jurisdiction. The Commission decided in the first instance in a final and appealable order that it lacked jurisdiction over the TU companies, and the agency finding deserves the ultimate determination which is the responsibility of the reviewing courts.

There is clear precedent for action by this Court to decide the jurisdictional question which is fundamental to further Commission consideration of this proceeding. In *United States* v. *General Motors Corp.*,[10] a case concerned with the eminent domain powers of the Federal government, the Court of Appeals had remanded for trial in accordance with its opinion. The correctness of the decision of the court depended upon the scope and meaning of the protection afforded by the Fifth Amendment. This Court found that ruling fundamental to the further conduct of the case, and concluded that the Court of Appeals had given improper instructions on remand. In like fashion, this Court can now decide the question of Commission jurisdiction over the TU companies, a question of statutory interpretation which not only is fundamental to further action by the Commission, but should even dispose of any need for further Commission action.

The Commission does not take issue with the merits of Petitioners' argument that it lacks jurisdiction over Petitioners as a matter of law. Rather, the Commission's response is limited to a suggestion that Petitioners' argument is of recent vintage.[11] Such a contention is patently untrue. As Petitioners maintained in

[10] 323 U.S. 373, 377 (1945).

[11] FERC Memo, at 4-5.

their primary argument on Brief to the Court of Appeals, the TU companies could not be subject to jurisdiction under Part II of the Federal Power Act once any interstate flow of electric energy ceased.[12] This position was reiterated in the Petition for Rehearing before the Court of Appeals.[13] Thus Petitioners do not present any new issue to this Court in their Petition, but merely seek to obtain the adjudication of the threshold issue which the Court below failed to render.

For these reasons and for those presented in the Petition for Certiorari, and in the initial Reply Brief, Dallas Power & Light Company, Texas Electric Service Company and Texas Power & Light Company pray that this Court grant the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, that this Court reverse the decision of the Court of Appeals and that this Court direct the Court of Appeals to sustain the Com-

[12] Brief for Intervenors, at 17, *Central Power & Light Co.* v. *FERC*, 575 F.2d 937 (D.C. Cir. 1978).

[13] Petition for Rehearing and Alternatively Suggestion for Rehearing en Banc, at 2, 9, *Central Power & Light Co.* v. *FERC*, 575 F.2d 937 (D.C. Cir. 1978).

mission's determination that it is without jurisdiction over the TU companies as a matter of law.

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Certificate of Service

I hereby certify that I have on this 31st day of October, 1978, served a copy of this Reply Brief, herein by mailing three copies thereof, together with a copy of this Certificate, postage prepaid, to counsel for all parties of record as follows:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-318

DALLAS POWER & LIGHT COMPANY, ET AL., *Petitioners,*

v.

CENTRAL POWER & LIGHT COMPANY, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT HOUSTON LIGHTING & POWER COMPANY IN SUPPORT

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OPINIONS BELOW AND JURISDICTION

The opinions below are correctly referenced and the jurisdictional prerequisites are adequately set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the Federal Power Commission (now the Federal Energy Regulatory Commission) (Commission) possesses any power under the Federal Power Act (Act) to exercise jurisdiction over electric utility companies which, at the time of the Commission's decision, neither own nor operate facilities for the transmission or sale of electric energy in interstate commerce, and which neither transmit nor sell electric energy in interstate commerce.

STATUTES INVOLVED

Sections 201 and 202 of the Federal Power Act are correctly set forth in the Petition for a Writ of Certiorari.

STATEMENT OF THE FACTS

Houston Lighting & Power Company (HL&P) agrees with the Petition for a Writ of Certiorari that all facts relevant to the jurisdictional Question Presented are admitted by all parties. HL&P therefore adopts the Statement of the Facts contained in the Petition for a Writ of Certiorari.

ARGUMENT

THE REMAND BY THE COURT OF APPEALS OF THE JURISDICTIONAL ISSUE CONTRADICTS THE LANGUAGE AND INTENT OF THE FEDERAL POWER ACT

HL&P supports the Reasons for Granting the Writ contained in the Petition for a Writ of Certiorari. HL&P agrees that by failing to consider the Commission's lack of the requisite statutory *power* to exercise jurisdiction based on the uncontroverted record facts, the Court of Appeals improperly remanded a pure question of agency jurisdiction. As stated in the Petition for a Writ of Certiorari, it is the duty of the appellate court to decide such jurisdictional issues. See *Stark* v. *Wickard*, 321 U.S. 288, 309-10 (1943).

Had the Court of Appeals reached the merits of the jurisdictional issue by analyzing Sections 201 and 202 of the Act, it could only have found that the Commission had no discretion to exert jurisdiction. The reach of the Commission's jurisdictional power is delineated by Section 201. The Commission has no discretion to exercise jurisdiction beyond the bounds identified in Section 201.

Thus, the Commission can exert jurisdiction only over statutory "public utilities." Under Section 201(e), a

utility is a statutory public utility *only* if it "owns or operates facilities subject to the jurisdiction of the Commission." Section 201(b) identifies those facilities which are subject to the jurisdiction of the Commission as those for the "transmission of electric energy in interstate commerce" and for "the sale of electric energy at wholesale in interstate commerce."

By this definition, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis." *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). The uncontroverted facts in this proceeding, as recited in the Petition for a Writ of Certiorari, allowed the Court of Appeals to track the jurisdictional line drawn by the Commission.

As the Commission found, based on uncontroverted facts, HL&P was susceptible to the claim of jurisdiction only during a ten-hour period on May 4, 1976. During this short period, HL&P was se ctly and involuntarily interconnected with electrical systems which directly or indirectly transmitted or sold electric energy in interstate commerce.

At 3:43 p.m., May 4, 1976, however, all interconnections with electrical systems which directly or indirectly transmitted or sold electrical energy in interstate commerce were opened. From that point, as a matter of law, there has been no jurisdictional basis under the Federal Power Act to permit the exercise of jurisdiction.

Moreover, the right of an electric utility to structure its operations to remain a nonjurisdictional, intrastate company, or to remove itself from the reach of the Commission's jurisdiction by terminating interstate operations, has been specifically recognized by the Supreme Court, the United States Court of Appeals for the Second Circuit and the Commission. *Connecticut Light & Power Co.* v. *FPC*,

324 U.S. 515, 517-519, 531 (1945); *Hartford Elec. Light Co.* v. *FPC*, 131 F.2d 953, 960 (2d Cir. 1942); *Connecticut Light & Power Co.*, 6 F.P.C. 104, 110 (1947). The remand by the Court of Appeals is thus contrary to these authorities as well as in conflict with the specific jurisdictional provisions of the Federal Power Act.

CONCLUSION

For the foregoing reasons, Respondent Houston Lighting & Power Company respectfully submits that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the Brief of Respondent Houston Lighting & Power Company In Support on counsel of record for the other parties by United States Mail, postage prepaid, on September 25, 1978.

/s/ STEVEN HUNSICKER

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